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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JOSEPH LEHMAN, SECRETARY, WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

DONALD MACFARLANE and JAMES FOGLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In response to an equal protection challenge, *McGinnis v. Royster*, 410 U.S. 263 (1973) applied the rational basis test to uphold a statute denying good time credits for parole eligibility to prisoners who spent time in county pretrial detention because they could not make bail. *Bearden v. Georgia*, 461 U.S. 660 (1983) applied a fundamental fairness standard to prohibit a court from automatically incarcerating an indigent defendant who was unable to pay a fine. This habeas corpus case presents the following question:

Whether, under 28 U.S.C. § 2254(d)(1), *Bearden v. Georgia* is "clearly established Federal law" governing an equal protection claim by inmates, alleging an inability to make bail, who challenge a state law permitting counties to award less good time to pretrial detainees in county jails than the state awards to inmates in state prisons.

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PETITION

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the three-judge panel of the United States Court of Appeals for the Ninth Circuit is reported at 179 F.3d 1131 (9th Cir. 1999) (App. 1a-27a). The opinion of the District Court for the Western District of Washington, including the Magistrate Judge's Report and Recommendation and the District Court's Order, is unpublished (App. 28a-44a). The opinion of the Washington Supreme Court is reported at 128 Wash. 2d 56, 904 P.2d 722 (1995) (App. 45a-63a).

JURISDICTION

Petitioner's petition for rehearing was denied by the Court of Appeals on June 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28, Section 2254(d)(1) of the United States Code provides:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on

the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]"

STATEMENT

This case presents the question of what constitutes clearly established law, under 28 U.S.C. § 2254(d)(1), to resolve a habeas corpus petition of an inmate seeking good time credits to reduce his sentence for time spent in jail awaiting trail. We begin by explaining the operation and good-time credit policies of state and county correctional facilities. We will then review the decisions of this Court that the parties contend constitute "clearly established Federal law". Finally, we will review the history of this case.

A. Operation of Washington State and County Correctional Facilities

Under Washington law, state and county correctional facilities operate independently and have distinct functions. State correctional institutions are under the control of the Washington State Department of Corrections (DOC), while county jails are operated by the 39 individual counties. Convicted defendants who are sentenced to confinement in excess of one year serve their sentences in a DOC facility. Wash. Rev. Code § 9.94A.190(1). Confinement sentences of one year or less are served in the county jail. *Id.*

County jails, unlike DOC facilities, have the additional function of incarcerating pretrial detainees who are denied or unable to pay bail. All pretrial defendants, other than those

charged with a capital offense, are eligible for release on personal recognizance or bail pending trial, unless the defendant poses a risk of flight or is likely to commit a violent crime, intimidate witnesses, or otherwise interfere with the administration of justice. Wash. Const. art. I, § 20; Washington Superior Court Criminal Rule (CrR) 3.2 (a).

The Washington Legislature has specifically divided the authority to grant or deny inmates earned early release credits between the county jails and the DOC. Each correctional agency in the state is given plenary authority to develop and promulgate policies for the award of earned early release credits for good conduct and good performance, up to a maximum of one third of an inmate's total sentence. *See* Wash. Rev. Code § 9.94A.150(1) (App. 81a) (authority for DOC earned early release policy); Wash. Rev. Code § 9.92.151 (App. 82a) (authority for county jail earned early release policies).

The amount of earned early release time to be awarded an inmate is determined by the correctional agency that has custody of the individual, in accordance with that agency's policy. If a defendant is transferred from a county jail to a state correctional facility, the county jail must certify to the DOC the amount of time spent in jail and the amount of earned early release time. Wash. Rev. Code § 9.94A.150(1) (App. 81a). The DOC will accept the county jail's certification unless the certification is based upon a manifest error. *In re Williams*, 121 Wash. 2d 655, 664-65, 853 P.2d 444 (1993).

B. Policies for the Award of Earned Early Release Time

The DOC's earned early release credit program consists of two types of credit: good-conduct time and earned time. A prisoner in a state facility earns "good conduct time" at the rate of 10 days for each 30 days served. The DOC may also award an additional 5 days "earned time" for each 30 days served for participation in work, academic, or treatment programs. DOC

then combines the total good conduct and earned time to determine the final sentence reduction, up to the statutory maximum of one-third of the imposed sentence. Department of Corrections Policy 350.130 (App. 64a-77a).

Similar to DOC, the Clark County and Pierce County Jails each use a tiered credit system. Under the jails' systems, good conduct time is awarded to all general population prisoners at a maximum 15 percent of the imposed sentence. Clark County Policy #05.160.100(c) (App. 78a); Pierce County Memorandum 92-23 (App. 79a-80a). As a result of the differing policies, an inmate in the custody of the DOC may earn 10 days good conduct time per 30 days served while an offender incarcerated pretrial in a county jail may earn only approximately 5 days good conduct time per 30 days served.

Comparable to the DOC's earned time policy, the jails' policies permit prisoners to receive additional credit through work programs to achieve a maximum earned early release credit of 30 percent of the imposed sentence at Clark County Jail and 20 or 30 percent at Pierce County Jail. *Id.* The only county detainees who are eligible for earned credits are offenders sentenced to terms of less than one year to be served in the county jail. These offenders are eligible to hold unit or trustee positions and, thus, may obtain the additional credit for good performance in work programs.

C. *McGinnis v. Royster* and *Bearden v. Georgia*

This case turns on which of this Court's decisions governs the legal claim presented and constitutes "clearly established Federal law, as determined by the Supreme Court." The first decision is *McGinnis v. Royster*, 410 U.S. 263 (1973). In *McGinnis* this Court considered an equal protection challenge to a New York statute that denied good conduct time credits for parole eligibility to state prisoners for time spent in pretrial detention in a county jail. The prisoners in that case argued that the statute discriminated against those state

prisoners who were unable to afford or qualify for bail. *Id.* at 268.

The Court applied a rational basis test and concluded that the disparate award of good time credits between county jails and state correctional facilities did not violate equal protection. *Id.* at 270. The Court noted the significant differences in purpose between county jails, which serve primarily as detention centers, and state prison, where systemic rehabilitation and other programs are available. *Id.* at 270-73. The Court found that these distinct purposes, and the fact that pretrial detainees did not participate in prison rehabilitative programs, rationally justified the denial of good time credits. *Id.* at 273.

The second decision is *Bearden v. Georgia*, 461 U.S. 660 (1983). In *Bearden* this Court considered a due process and equal protection-based challenge to a probation revocation where the revocation was imposed because of the defendant's inability to pay a fine and restitution. Employing a "fundamental fairness" standard, the Court concluded that sentencing courts may not impose a fine as a sentence and then automatically convert it into a jail term solely because the defendant is indigent and unable to pay the fine in full. *Id.* at 667.

Instead, a sentencing court must inquire into the defendant's reasons for failing to pay and must consider alternative measures of punishment other than imprisonment. *Id.* at 672-73. Only if the alternative measures are inadequate to meet the State's interests in punishment may the court imprison a defendant who has made bona fide efforts to pay. *Id.* The Court's opinion in *Bearden* does not discuss or even cite *McGinnis.*

D. Procedural History

1. Washington Courts

Alleging inability to post bail due to indigency, Respondents MacFarlane and Fogle filed separate personal restraint petitions challenging the county jail earned early release policies of giving less than the statutory permissible maximum sentence reduction of one-third earned early release time to pretrial detainees who are ultimately sentenced to the DOC. While pretrial detainees receive earned early release credit, they receive less than the amount available under DOC policy.

The Washington Supreme Court consolidated Respondents' cases for review. There was a dispute whether the Respondents were even eligible for bail, the court noting that both Mr. Fogle and Mr. MacFarlane were held on fugitive warrants in addition to their new criminal charges. While the Washington Supreme Court determined that failure to set bail "does not necessarily represent a wealth-based classification to merit semi-suspect status", the court construed the facts in a light most favorable to Respondents, considering the case as one where the denial of a liberty interest was due to indigency.

The Washington Supreme Court denied Respondents' claims in a 5 to 4 opinion. *In re Fogle,* 128 Wash. 2d 56, 63-67, 904 P.2d 722 (1995) (App. 45a-63a). The majority opinion applied an intermediate standard of review for equal protection analysis, following its previous decisions in *State v. Phelan*, 100 Wash. 2d 508, 512-514, 671 P.2d 1212 (1983) and *In re Mota*, 114 Wash. 2d 465, 473-474, 788 P.2d 538 (1990). Under that standard, the majority concluded that the county jail earned early release policies did not violate equal protection principles. *Fogle,* 128 Wash. 2d at 63-65 (App. 50a-52a). The majority determined that offenders do not have a statutorily created right to a specific method of calculation of earned early release credit. The majority also determined the county jails' policies limiting access to work programs for purposes of good performance were

consistent with the statutory grant of independent authority to each of the states' correctional agencies to establish early release credit policies. *Id.* at 61-62 (App. 48a-49a).

The majority of the Washington Supreme Court held that the county jails' tiered earned early release credit policies, awarding only 15 percent credit for good conduct and limiting access to work programs, did not violate equal protection principles. *Id.* at 63 (App. 50a-51a). The court determined that limiting access to work programs served a substantial purpose of punishment and discipline by basing eligibility on the severity of the crime and the prisoner's behavior. *Id.* Further, the court concluded that pre-sentence detainees were not similarly situated to convicted prisoners in a county jail or a DOC facility. *Id.* at 64 (App. 51a). In particular, the risk of flight from prosecution makes presentence detainees particularly unsuitable for work program assignment. The court observed that the state had a substantial interest in maintaining prisoner discipline, preventing flight from prosecution and preserving local control over jails justifying disparate treatment. *Id.* at 63 (App. 50a-51a).

Four justices dissented from the majority's decision that the Equal Protection Clause of the Fourteenth Amendment was not violated by the county jails' policies. Rejecting the majority's conclusion that jail discipline was a substantial basis for the disparate treatment, the dissent concluded that the counties and state had no legitimate reason to award the Respondents less good time credit than they would have been awarded had they served their entire sentence in a DOC facility. *Id.* at 66-73 (App. 54a-62a). Determining that the flaw was in the entire system of awarding, certifying, and crediting time against the sentences of offenders who are detained in a county facility, the dissent recommended that the DOC disregard the credit for good behavior calculated and certified by the counties, calculate the amount of credit for good behavior Respondents would have received had they been subject to the DOC earned early release time policies for that period of time, and credit the amount of good conduct time against the Respondents' sentences. *Id.* at 70-73 (App. 58a-62a).

2. Federal Habeas Corpus Proceeding

In August of 1996, Respondents Fogle and MacFarlane filed individual habeas corpus petitions in the United States District Court for the Western District of Washington.[1] The Respondents alleged that the Pierce County and Clark County jail policies, prohibiting pretrial detainees who are unable to post bail and will ultimately be sentenced to a DOC facility from earning the permissible statutory maximum one-third sentence reduction for earned early release time, violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The district court consolidated the petitions.

Petitioner moved for summary judgment arguing that (1) a standard equal protection analysis using rational basis review delineated in *McGinnis* was clearly established federal law and the proper standard for review, (2) the Washington Supreme Court's use of an intermediate standard of equal protection analysis provided a stricter standard for review than required under *McGinnis*, and (3) the Washington Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1).

Respondents argued that, in applying a standard equal protection analysis, the Washington Supreme Court applied an improper standard of review and that the appropriate standard of review for a claim based on wealth discrimination was the balancing test from *Bearden*.

The district court denied Respondents' petitions. The district court determined that the intermediate level of scrutiny applied by the Washington Supreme Court was consistent with *Bearden* and that the Washington Supreme Court's denial of Respondents' equal protection claim was neither contrary to nor

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[1] MacFarlane and Fogle named as respondents the superintendents of the correctional facilities in which they were incarcerated—Kay Walter and Kenneth Ducharme. Respondents remain in custody of the Secretary of the Department of Corrections, Joseph Lehman.

an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1) (App. 28a-44a).

On appeal, the Court of Appeals for the Ninth Circuit reversed the district court's decision as to the good conduct time policies and affirmed as to the good performance policies. *MacFarlane v. Walter*, 179 F.3d 1131, 1143 (9th Cir. 1999) (App. 1a-27a). Judge Reinhardt, writing for the court, concluded that the Washington Supreme Court's failure to consider Respondents' equal protection claim under the factors of *Bearden* was contrary to clearly established federal law. 179 F.3d. at 1138-40, 1142 (App. 17a-21a, 25a). Applying the *Bearden* factors, the panel concluded that affording county pretrial detainees less good conduct credit than they would have received if incarcerated in a state facility violates the Equal Protection Clause. Therefore, the court directed the DOC to credit Respondents' sentences with 10 days of good conduct time for every 30 days they were incarcerated in the county jail. *Id.* at 1143 (App. 27a).

REASONS FOR GRANTING THE PETITION

There are two important reasons for granting this petition. First, there is a substantial conflict among the circuit courts over the application of 28 U.S.C. § 2254(d)(1)'s phrase "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The meaning of this language is currently before the Court in *Williams v. Taylor*, No. 98-8384.

Second, the Ninth Circuit's conclusion that *Bearden* is "clearly established Federal law" is in conflict with decisions that apply *McGinnis* to cases involving claims by inmates that they are entitled to good time credits for time spent in detention awaiting trial. Both federal and state courts have followed *McGinnis* and applied the rational basis standard to such equal protection claims. These decisions do not apply *Bearden*, and for the most part, do not discuss the case. The only court that views

Bearden as "clearly established Federal law" in resolving these claims is the Ninth Circuit in the decision below.

A. THERE IS CONFLICT AND CONFUSION AMONG THE CIRCUITS REGARDING THE MEANING AND APPLICATION OF 28 U.S.C. § 2254(d)(1).

This case concerns the meaning and application of the language of 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, *cert. granted*, ___U.S.___, 119 S. Ct. 1753 (1999), No. 98-8384, this Court has accepted review to determine the meaning and application of 28 U.S.C. § 2254(d)(1)'s phrase "contrary to ... clearly established Federal law, as determined by the Supreme Court". This case will be directly affected by any decision this Court renders in *Williams v. Taylor*. Moreover, this case presents the opportunity for the Court to specifically address and give meaning to the term "clearly established Federal law".

As this Court is well aware, the lower courts disagree and present confusing and conflicting decisions regarding the application of 28 U.S.C. § 2254(d)(1) to state court adjudicated claims. The various interpretations of § 2254(d)(1) generally fall into two different groups. The Fifth, Seventh, and Eleventh Circuits have all employed a bifurcated approach, applying the "contrary to" language to issues of pure law and the "unreasonable application" language to mixed questions of law and fact. *Neeley v. Nagle*, 138 F.3d 917, 923-24 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 811 (1999); *Drinkard v. Johnson*, 97 F.3d 751, 767-69 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997); *Lindh v. Murphy*, 96 F.3d 856, 868-71 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

Under this viewpoint, the first step in resolving a habeas petitioner's claim is to determine the "clearly established" law at the relevant time. *Neeley v. Nagle*, 138 F.3d at 923. The law is clearly established "if the state court considering a habeas petitioner's claim would have felt compelled by existing precedent to conclude that the rule the petitioner seeks was

required by the Constitution." *Id.* The court must then determine whether the state adjudication was contrary to the clearly established Supreme Court case law, either because the state court failed to apply the proper Supreme Court precedent or because the state court reached a different conclusion based on substantially similar facts. *Id.* at 924.

The First, Third, and Fourth Circuits have arrived at a somewhat different formulation of § 2254(d)(1). Under those courts' reading of the statute, a federal habeas court must undertake a two-step analysis of the state court's decision, first determining whether the decision is "contrary to" a directly governing Supreme Court rule. If there is no such specific rule, the federal court then must determine whether the state court decision reflects an unreasonable application of the Supreme Court's generally relevant jurisprudence to the facts of the petitioner's case. *Matteo v. Superintendent*, 171 F.3d 877, 888-91 (3rd Cir. 1999); *O'Brien v. Dubois*, 145 F.3d 16, 24-25 (1st Cir. 1998); *Green v. French*, 143 F.3d 865, 870-73 (4th Cir. 1998).

Even though agreeing on the general analysis, these circuit courts disagree about the "clearly established" prong of § 2254(d)(1). Under *O'Brien*, the First Circuit determined that the "contrary to" analysis applies only if this Court has articulated a general rule that governs the claim. The rule "*requires something more than a recognition that the Supreme Court has articulated a general standard that covers the claim.* To obtain relief at this stage, *a habeas petitioner must show that the Supreme Court precedent requires an outcome contrary to that reached by the relevant state court.*" *O'Brien*, 135 F.3d at 24-25. (emphasis added).

In contrast, the Fourth Circuit in *Green v. French* held that a decision is "contrary to" Supreme Court precedent only when "*either through a decision of pure law or application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided*, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached *in the precedent which addresses*

the identical issue." *Green v. French*, 143 F.3d at 870 (emphasis added).

The Third Circuit in *Matteo* substantially adopted the *O'Brien* approach, noting that "the critical question is 'whether a Supreme Court rule—by virtue of the factual similarity (though not necessarily identicality) or its distillation of general federal law concepts into a channeled mode of analysis specifically intended for application to variant factual situations—can fairly be said to require a particular result in a particular case.'" *Matteo*, 171 F.3d at 888 (quoting *O'Brien*, 145 F.3d at 25).

The Ninth Circuit in its decision in this case noted that this Court has not yet defined the term "clearly established" in the § 2254(d)(1) context nor had the Ninth Circuit itself directly opined on what constitutes "clearly established Federal law." *MacFarlane*, 179 F.3d at 1139 (App. 19a). The Ninth Circuit determined that a petitioner need not point a habeas court to a factually identical precedent because "clearly established" Supreme Court law "often erects a framework intended for application to variant factual situations". *Id.* at 1140 (App. 20a).

The meaning of 28 U.S.C. § 2254(d)(1) is uncertain. This Court should grant this petition to resolve this uncertainty.

B. THE NINTH CIRCUIT'S DECISION THAT *BEARDEN v. GEORGIA* IS "CLEARLY ESTABLISHED FEDERAL LAW" IS IN CONFLICT WITH DECISIONS THAT APPLY *MCGINNIS v. ROYSTER.*

The Ninth Circuit determined that the wealth discrimination balancing test from *Bearden* was the controlling standard of review--the "clearly established Federal law"--for an equal protection challenge to the disparate award of good conduct time between county pretrial detainees and state prisoners. This conclusion radically departs from standard equal protection analysis in *McGinnis,* which applies the rational basis test to such claims. The conclusion that *Bearden* is "clearly

established law" is in conflict with decisions of other circuit courts, decisions of state appellate courts, and this Court's decision in *McGinnis*. No federal or state cases support the Ninth Circuit's determination that *Bearden* is the "clearly established Federal law" to be applied in this legal and factual situation.

1. The Ninth Circuit's Decision Conflicts with Decisions of the First and Tenth Circuits.

The Ninth Circuit's decision conflicts with decisions of both the First and Tenth Circuits which follow *McGinnis* and apply a standard equal protection analysis. These courts rejected equal protection challenges based on indigency to the disparate award of good time to pre-sentence detainees in county jails. In *Lemieux v. Kerby*, 931 F.2d 1391 (10th Cir. 1991), the Court of Appeals for the Tenth Circuit considered an equal protection and due process challenge to a New Mexico statute authorizing sentencing credit for good time after sentencing but not for good time in county jail before sentencing. The petitioner argued that the sentencing scheme unconstitutionally penalized indigent prisoners who could not post bail. *Id.* at 1392. The Tenth Circuit determined that the New Mexico Supreme Court properly applied this Court's decision in *McGinnis,* analyzing the case under the rational basis test for equal protection analysis. The court specifically rejected the petitioner's argument that *McGinnis* was overruled by *Bearden.* "Nowhere in *Bearden* did the Court even mention *McGinnis*, let alone that it was overruling *McGinnis*." *Lemieux,* 931 F.2d at 1393 n. 4.

In *Chestnut v. Magnusson*, 942 F.2d 820 (1st Cir. 1991), the First Circuit also determined that the rational basis standard for equal protection review from *McGinnis* is applicable in cases presenting an equal protection challenge to disparate good conduct time policies between state inmates and pretrial detainees who could not make bail. *Chestnut* concluded that the failure of the State of Maine to provide a system of good-time

credits to pretrial detainees, incarcerated prior to trial as a result of inability to make bail because of indigency, while allowing such credits to sentenced prisoners, did not amount to the denial of equal protection. Further, the court determined there was no wealth-based discrimination and there was a rational basis for the distinction between pretrial detainees and sentenced prisoners. *Id.*

Although *Chestnut* was decided more than seven years after *Bearden*, the court did not discuss *Bearden* or consider its wealth based discrimination balancing test. Obviously, the *Chestnut* court did not consider *Bearden* relevant, much less clearly established law.

2. The Ninth Circuit's Decision Conflicts with Decisions of State Appellate Courts.

State appellate courts have also considered challenges to the disparate award of good time credit between pretrial detainees in jail who are unable to make bail and offenders in the custody of state prisons. These cases apply *McGinnis,* not *Bearden.*

In *State v. Aqui*, 104 N.M. 345, 721 P.2d 771 (1986) the issue was whether "defendants [should] be given good time credits against their sentences for periods they spent in presentence confinement." *Id.* at *347.* The defendants were in presentence confinement because they failed to make bail. *Id.* The court upheld the state statute and concluded that "*McGinnis* does control here[.]" *Id.* at 348. The New Mexico Supreme Court reversed the decision of the New Mexico Court of Appeals, which relied on *Bearden.* The New Mexico Supreme Court concluded:

> "The present case simply does not implicate the due process concerns that underlay the United States Supreme Court decision in *Bearden.*" *Id.* at 351.

In *Norris v. State*, 541 A.2d 926 (Me. 1988) each petitioner sought a "reduction of his sentence in the amount of his 'good time' served in pretrial detention." *Id.* at 927. The petitioners claimed the system discriminated "against indigent detainees who cannot afford bail." *Id.* Citing *McGinnis* the court concluded that:

> "Granting good-time credits for imprisonment by sentence rationally furthers the State's legitimate interest in controlling prisoner discipline." *Id.* at 930.

Again the court did not mention *Bearden* in its opinion.

In *Crerand v. State*, 176 Ariz. 149, 859 P.2d 772 (1993), prisoners were not eligible to earn good time credits until actually sentenced and transferred to the Department of Corrections. *Id.* at 151. The prisoner claimed the denial of good time credits "discriminates against those inmates who are unable to afford bail." *Id.* Once again, the court made no mention of *Bearden* and upheld the state system based on the rational basis test from *McGinnis*. *Id.* at 152-54.

The decision of the Washington Supreme Court is also consistent with this pattern. The majority did not discuss *Bearden* even though they applied intermediate scrutiny instead of the rational basis test in *McGinnis*. *Fogle*, 128 Wash. 2d at 62-63 (App. 49a-50a). Even the dissent, which found an equal protection violation, was not based on *Bearden* nor did it even discuss that case. For that matter, Respondents MacFarlane and Fogle did not rely upon, or even cite, *Bearden* in their Washington Supreme Court briefs.

The Ninth Circuit's conclusion that *Bearden* is "clearly established Federal law" conflicts with these state court decisions applying standard equal protection analysis.[2]

3. The Ninth Circuit's Decision Conflicts with this Court's Decision in *McGinnis v. Royster.*

The Ninth Circuit's decision also conflicts with *McGinnis*. In *McGinnis* this Court applied the rational basis test to uphold a New York statutory scheme which prohibited good time credit for the period of county jail detention served prior to incarceration in state prisons.

McGinnis is "clearly established Federal law, as determined by the Supreme Court of the United States" to resolve claims by inmates that they are entitled to good time credits for time spent in jail because they could not make bail. Both federal and state courts recognize that *McGinnis* is "clearly established Federal law" and have applied the rational basis standard of equal protection analysis.

The Ninth Circuit's decision expressly rejects this Court's equal protection analysis, applying instead the due process/equal protection balancing test from *Bearden.* The Ninth Circuit distinguished *McGinnis* on the basis that the issue in *McGinnis* was not framed as one of disparate treatment of indigent prisoners. *MacFarlane,* 179 F.3d at 1140 n. 11

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[2] Another example of the conflict between the Ninth Circuit's decision and the decisions of state courts is the analysis applied to earned credits. Earned credits are based on participation in work or other programs. The Ninth Circuit upheld denial of earned credit to presentence detainees in county jail. *MacFarlane,* 179 F.3d at 1143 (App. 27a). However, it did so based on *Bearden.* State courts that have upheld denial of earned credits have not applied or discussed *Bearden. State v. Nyborg,* 122 Wis.2d 765, 364 N.W.2d 553 (1988); *People v. Alderman,* 720 P.2d 1000 (Colo. App. 1986); *People v. Poole,* 168 Cal.App.3d 516, 214 Cal.Rptr. 502 (1985).

(App. 21a). However, the Court in *McGinnis* was well aware that the good time differences at issue resulted in longer incarceration for those in pretrial county jail custody because they could not make bail.

Bearden did not overrule or mention *McGinnis*. Only one of these decisions—*McGinnis* or *Bearden*—can be the "clearly established Federal law, as determined by the Supreme Court" applicable to Respondents' claim. The two decisions apply fundamentally different tests. The Ninth Circuit's decision establishes a substantial conflict that should be resolved by this Court.

C. The Method for Determining What is "Clearly Established Federal Law" Is An Important Issue.

The standard of review in federal habeas corpus proceedings in which the petitioner's claim was previously adjudicated by a state court requires that the federal court decide whether the state court's decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Thus, a critical, threshold issue in virtually every habeas corpus case will be identifying the relevant "clearly established Federal law", the benchmark against which the state court's decision is measured.

Bearden is, without question, "clearly established Federal law" for purposes of adjudicating legal claims that fall within its ambit—cases of probation revocation due to failure to pay restitution or fines. *Bearden* does not purport to govern claims concerning the award of good time credits, and most federal and state court jurists would deem *McGinnis* to be the controlling Supreme Court precedent.

In this case, however, the Ninth Circuit borrowed a decision from one context, expanded the application and transplanted it into another context, and then concluded that *Bearden* was the "clearly established Federal law, as determined

by the Supreme Court" for deciding a *McGinnis*-type claim. This mode of analysis substantially broadens the scope of review under 28 U.S.C. § 2254(d)(1).

The manner in which the federal courts determine whether a state court's decision comports with "clearly established Federal law" presents an issue of vital importance to the States and implicates issues of federalism. The Court should grant review to decide this important issue.

CONCLUSION

For the reasons stated herein the petition should be granted.

RESPECTFULLY SUBMITTED

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD MACFARLANE and JAMES FOGLE, *Petitioners-Appellants*,	)	NO. 97-35725
	)	D.C. No
	)	CV-96-05688-FDB
v.	)	
	)	ORDER AND
KAY WALTER and KENNETH DUCHARME, *Respondents-Appellees.*	)	AMENDED
	)	OPINION
	)	

Appeal from the United States District Court
for the Western District of Washington.
Franklin D. Burgess, District Judge, Presiding.

Argued and Submitted
October 5, 1998 – Seattle, Washington

Filed May 5, 1999
Amended June 9, 1999

Before: Otto R. Skopil, Jr., Stephen Reinhardt, and
Susan P. Graber, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Criminal Law and Procedure/Prison

The Court of Appeals affirmed a judgment of the district court in part and reversed in part. The court held that a county policy of affording indigent pre-sentence detainees less good conduct credit than those who are released on bail while awaiting sentencing violates the Equal Protection Clause

The Supreme Court held in *Bearden v. Georgia*, 461 U.S. 660 (1983) that incarceration should not be imposed on an indigent individual solely because of that person's inability to pay.

In the State of Washington, persons who have been convicted of crimes may be released on bail before sentencing. However, many who are ultimately confined in state prison are detained in county jails before sentencing because they do not have the funds to post bail.

Under Washington law, a sentence is reduced when a prisoner receives early-release credit for good conduct or good performance. The Washington legislature has authorized the Department of Corrections (DOC) and county jail authorizes to develop independent early-release credit policies. In the cases of prisoners who are confined in a county jail before sentencing and transfer to a state facility, the DOC computes the total early-release credits to be applied to their sentences, combining the early-release credit certified by the county jail with the time credit accumulated at the state facility.

An inmate of a state prison can earn good-conduct and good-performance credit up to an aggregate of one quarter of the sentence imposed. However, the jail authorities of Clark County and Pierce County developed policies that permit a maximum early-release credit for pre-sentence detainees of approximately one-third as much as could be earned by convicted persons who are ultimately confined in state prison, but were free on bail

before sentencing.

Petitioners Donald MacFarlane and James Fogle were convicted in Washington of crimes that involved prison sentences. They were unable to post bail after their convictions because of indigence, and were therefore detained in Clark and Pierce county jails, respectively, prior to sentencing. Both received the maximum good-conduct credit as jail inmates. However, had MacFarlane and Fogle posted bail, they would have earned double the time they were credited with by the county jails. Clark County and Pierce County policies did not have work or other programs through which pre-sentence detainees could earn good-performance credit.

MacFarlane and Fogle challenged the constitutionality of the lesser award of early-release credit for the time they were detained in jail before sentencing, seeking credit equal to what they would have received had they been able to post bail and serve their sentences in full in state facilities. They contended that they were denied equal protection by not being awarded the amount of early-release time that state prisoners can receive.

The Washington Court of Appeals rejected Fogle's claim, holding that Pierce County's system of awarding early-release credits to pre-sentence detainees was constitutional. After certifying MacFarlane's petition in the Court of Appeals and consolidating the cases for review, the Washington Supreme Court upheld the county jails' policies of granting pre-sentence detainees substantially less early-release credit than that afforded under the DOC's policy. MacFarlane and Fogle sought federal habeas corpus relief.

Applying the intermediate level of scrutiny used by the Washington Supreme Court, the district court granted summary judgment for appellee State of Washington prison officials. MacFarlane and Fogle appealed.

The State contended on appeal that there was no equal protection violation because there was a rational connection between its sentencing system and the purposes it served, i.e., prisoner discipline and local control.

[1] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), [2] no habeas relief may be granted to a person in custody pursuant to a judgment of a state court unless the underlying state adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

[3] *Bearden*, decided in 1983, and grounded in 30 years of precedents, was clearly established law governing the issue presented in this case at the time of the Washington Supreme Court decision denying the petitioners' state habeas petitions.

[4] *Bearden* delineated the factors to be balanced in examining an equal protection claim involving a lack of financial resources and the working of the criminal justice systems: it requires an inquiry into (1) the nature of the individual interest affected; (2) the extent to which it is affected; (3) the rationality of the connection between the legislative means and purpose; and (4) the existence of alternative means for effectuating the purpose. The Court held that to deprive a defendant his freedom simply because he cannot pay would be contrary to the Fourteenth Amendment's requirement of fundamental fairness. [5] Ninth Circuit case law also confirms that *Bearden* was clearly established law on the issue of incarceration based on indigency.

[6] In the AEDPA context, a habeas petitioner need not point to a factually identical precedent to establish clearly established law. "Clearly established" Supreme Court law often erects a framework intended for application to variant fact situations. [7] *Bearden* erected the framework intended for application where a defendant suffers increased incarceration because of indigency, and thus was clearly established law governing the issue presented in this case.

[8] The Washington Supreme Court did not mention *Bearden* or any other federal case in its opinion. The court failed to identify or apply the factors that must be weighed under *Bearden* in determining whether equal protection has been violated by a wealth-based classification. The court failed to

consider the petitioners' interest at all, or to examine the connection between the legislative means and objectives, or to consider any alternative means for accomplishing the penological purposes that it identified.

[9] The nature of the individual interest affected-physical liberty- weighs heavily in the constitutional calculus; the state's interests must be highly significant if they are to outweigh this fundamental interest. The Supreme Court has repeatedly found discrimination unconstitutional when additional incarceration is caused solely by disparities in wealth. The crucial factor in this case was that the additional incarceration was caused solely by the petitioners' indigency: had they posted bail and served their entire sentences in a state facility, they would have been required to serve less time.

[10] As to the extent to which the petitioners' physical liberty was affected, even a single day of incarceration is of substantial significance for constitutional purposes. Had Fogle posted bail, his incarceration would have been shorter by 16 days. Had MacFarlane posted bail, his incarceration would have been reduced by approximately 23 days.

[11] The state court's failure to examine the rationality of the connection between the claimed legislative purposes and the good-conduct policy contributed to its error. Maintaining prisoner discipline has no rational connection to affording county pre-sentence detainees *less* good-conduct credit; in fact, one might reasonably assume that increasing the amount of good-time credit would increase inmates' incentive to behave well, and thus reduce disciplinary problems. Local control is only weakly connected to the counties' calculation of good-time credit for detainees who serve most of their sentences in state facilities. County jails have little rational interest in how much credit for good conduct is ultimately received by their *former* inmates who have moved to the state system. It is illogical to contend that the ultimate calculation of maximum good-conduct credit of a prisoner who is no longer in county jail could endanger or further local control. Moreover, to the degree that local control was implicated, that interest was substantially outweighed by the prisoners' interest in liberty and freedom from punishment on account of indigency.

[12] There were alternative means to accomplish the legislative purposes that would not have involved additional incarceration for those who were unable to make bail and whose conduct was satisfactory during their stays in county jail. Counties can and do deny good-conduct time entirely to detainees who presented disciplinary problems, and counties can revoke or restrict the privileges of such individuals. When a prisoner is transferred post-sentencing to the DOC, the county could forward a statement of the total days the prisoner spent in jail and the days on which he did not earn good-conduct credit. The DOC could then calculate the amount of credit for good conduct that the prisoner should receive.

[13] The Washington Supreme Court's failure to apply *Bearden*, and its decision that the counties' good-conduct policies did not violate equal protection, was contrary to clearly established federal law. Such a failure fell within the "contrary to" provision of the AEDPA. [14] MacFarlane and Fogle also challenge the counties' good-performance policies, which raise the same constitutional question as the good-conduct policies, but require a different answer.

[15] The counties asserted that concerns over community safety and flight risk primarily underlay their refusal to permit pre-sentence detainees to participate in good-performance programs that frequently entail allowing inmates to work outside the jails. They pointed out significant differences in the composition of the pre-sentence detainee population, which may include murders, rapists, and career offenders, and the larger population of convicted inmates who were sentenced to a one year or less in the county jail. The counties established a rational connection between the legislative means and purpose. A county's ability to decide on eligibility to participate in a good-performance program during jail detention is closely tied to local control. No alternative means were identifiable for ensuring community safety and preventing flight while permitting inmates to participate in "performance" programs. The good-performance policies therefore did not violate the Equal Protection Clause.

COUNSEL

James E. Lobsenz, Carney Badley Smith & Spellman, Seattle, Washington, for the petitioners-appellants and Meredith Rountree, Law Office of Meredith Martin-Rountree, Seattle, Washington, for petitioner-appellant MacFarlane.

Donna H. Mullen, Office of General Counsel, Corrections Division, Olympia, Washington, for the respondents-appellees.

ORDER

The panel has voted to deny Appellees' petition for rehearing. Judge Reinhardt and Judge Graber have voted to deny the petition for rehearing en banc and Judge Skopil has recommended denying the petition for rehearing en banc.

The Opinion is amended as follows:

(1) At Slip Op. 4197, second paragraph, line 4:

"one-third" is changed to "one-quarter"

(2) At Slip Op. 4197, second paragraph, line 6:

"two days" is changed to "three days"

(3) At Slip Op. 4198, top paragraph, line 1:

"two-thirds" is changed to "three-quarters" and the citation to *In re Williams* is deleted

(4) At Slip Op. 4198, top paragraph, line 3:

"five days" is changed to "six days"

(5) At Slip Op. 4198, top paragraph lines 9-12:

last sentence is deleted ("Accordingly . . . would be superfluous")

(6) At Slip Op. 4199, top paragraph, line 2:

"2" is changed to "3:

(7) At Slip Op. 4199, top paragraph, line 16:

"approximately a third as much as" is changed to "less than half that which"

(8) At Slip Op. 4200, line 10:

"20" is changed to "30" and "51" is changed to "34"

(9) At Slip Op. 4200, Lines 11-12:

"nearly triple the" is changed to "double the" and n. 7 is deleted

(10) At Slip Op. 4201, top paragraph, line 3:

"20 served" is changed to "30 served" and "72 days" is changed to "48 days"

(11) At Slip Op. 4201, top paragraph, line 5:

"nearly triple" is changed to "more than double"

(12) At Slip Op. 4210, top paragraph, line 9:

"33 days" is changed to "16 days"

(13) At Slip Op. 4210, top paragraph, line 12:

"47 days" is changed to "23 days"

(14) At Slip Op. 4212, second paragraph is amended to read as follows:

MacFarlane and Fogle also challenge the counties' good-performance policies, which raise the same constitutional question as the good-conduct policies, but require a different answer.

(15) At Slip Op. 4213, line 3:

"it is their" is deleted

(16) At Slip Op. 4213, line 4:

"that" is deleted

(17) At Slip Op. 4213, line 12:

"thus" is deleted

(18) At Slip Op. 4213, lines 25-33:

sentence is deleted ("in addition . . . given the statutory maximum")

OPINION

REINHARDT, Circuit Judge:

Petitioners Donald MacFarlane ("MacFarlane") and James Fogle ("Fogle") appeal the district court's grant of summary judgment in favor of prison officials Kay Walter and Kenneth Ducharme in petitioners' consolidated 28 U.S.C. § 2254 habeas corpus petitions. MacFarlane's and Fogle's state habeas petitions alleged that the Pierce and Clark County Jails' "early release", or "good conduct" and "good performance," policies, as applied to them, violate equal protection and due process. These early-release policies prevent county pre-sentence detainees, such as MacFarlane and Fogle, who are unable to afford bail and are ultimately sentenced to a state facility operated by the Department of Corrections, from earning the same early-release credit as prisoners who are financially able to post bail and thus serve their entire sentences in a state facility. We must determine whether the Washington courts' denial of MacFarlane's and Fogle's petitions was "contrary to" or an "unreasonable application of" clearly established federal law. *See* 28 U.S.C. § 2254(d). Because we conclude that the denial was contrary to clearly established federal law, we reverse in part, and affirm in part, the decision of the district court, and order that the petitioners' writs of habeas corpus be granted.

I.

A. *The Washington Sentencing and "Early Release" System*

The State of Washington operates a determinate sentencing system, under which persons convicted of felonies receive a sentence of a specific number of months based upon a sentencing grid contained in the Sentencing Reform Act of 1981. Wash. Rev. Code Chapter 9.94A. When a sentence exceeds twelve months, the prisoner must serve the sentence in a state facility. RCW 9.94A.190(1). Prior to sentencing, however, many prisoners who are ultimately confined in a state facility serve time in a county jail because they have not posted, or have been denied bail. The time actually served in county jail as pre-trial detainees is ultimately credited against their sentences.

In addition to being reduced for time served, a sentence imposed under the Sentencing Reform Act is reduced when a prisoner is credited with early-release time, either for good conduct or for good performance. In *In re Mota* 114 Wash.2d 465, 472, 788 P.2d 538 (1990), the Washington Supreme Court held that equal protection requires that *all* prisoners be eligible for early-release credit for time served, both in pre-sentence detention and post-sentence incarceration. *Mota* did not, however, concern the issue presented here – whether all prisoners must be eligible for the same amount of early-release credit. The Washington legislature, in accordance with *In re Mota*, authorized correctional agencies, both state and county, to develop procedures for implementing a system of granting early-release credit. Wash. Rev. Code 9.94A.150(1). Pursuant to the statutory mandate, the Department of Corrections, whose policies apply only in state facilities, and the authorities who operate the county jails, have developed independent early-release credit policies. Ultimately, however, in the case of prisoners like MacFarlane and Fogle, who are considered to have served part of their sentences in a county jail and part in a

state facility, it is the Department of Corrections which must compute the total amount of early-release credits to be applied to their sentences, combining the amount of early-release credit certified by the county jail with the amount of early-release credit accumulated at the state facility. *See In re Williams*, 121 Wash.2d 655, 658-59, 853 P.2d 444 (1993).

1. *Department of Corrections' Early-Release Policy*

The Department of Corrections' early-release credit system, applicable in state facilities, consists of two types of credit: good conduct and good performance[1] A prisoner in a state facility can earn good-conduct credit of up to one-quarter of his sentence – a prisoner, that is, can earn one day of good-conduct credit for every three days served. In other words, a prisoner who earns the maximum credit serves only three-quarters of the sentence imposed. In addition, a prisoner can earn good performance credit of up to one day for every six days served, if he participates in work, academic, or treatment programs. The Department of Corrections then combines the total good-conduct and good-performance credit to determine the final sentence reduction, but only up to the statutory maximum of one-third of the imposed sentence. Wash. Rev. Code 9.94A.150(1).

2. *Clark County and Pierce County Early Release Policies*

The Clark County Jail and Pierce County Detention and Corrections Center (the county jails at issue in this case) used tiered credit systems to award early release credits at the time

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[1] In the various statutes and policies, different terms are used to describe these two distinct categories which make up "early release" credit. "Good time" or "good behavior" or "good conduct" describes credit for an absence of misconduct. "Good performance" or "earned time" describes credit awarded for affirmative participation in various work or treatment programs. For purposes of clarity, we shall use the terms "good conduct" and "good performance" in this opinion.

the petitions were filed: All general population inmates (like MacFarlane and Fogle) were eligible for good-conduct credit at a rate of 15% of their sentences.[2] This means, of course, that they were able to earn substantially less good-time credit than prisoners confined in state facilities. Specifically, as construed by the Washington Supreme Court, the counties' policies provided that detainees received 1 day of credit for every 5-2/3 days of good conduct, instead of 1 for every 3.[3] Some inmates can also receive additional good-performance credit through work programs. When the credit from the good-conduct and performance programs is combined, Clark County Jail allows inmates to achieve a maximum early-release credit of 30% or 20%, depending on the type of work or other program involved. However, because pre-sentence detainees are not eligible to participate in work or other good performance programs, *see In re Fogle*, 128 Wash.2d 56, 63, 904 P.2d 722 (1995), they can earn only good-conduct and not good-performance credit. Accordingly, the maximum early-release time that can be earned by pre-sentence detainees, such as Fogle and MacFarlane, in these county jails is less than half that which can be earned by defendants who are able to post

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[2] The Clark County Jail Good Time policy stated, in pertinent part:

> "Days are calculated with a Good-Time Credit for all eligible inmates. The 15% Good Time credit will be applied to the total sentence after the seventh day of the current incarceration."

The Pierce County good behavior release (GBR) credit policy applicable to Fogle, stated in pertinent part:

> "General Population Prisoners and Work Release Prisoners will receive fifteen percent (15%) GBR credit."

We note that Pierce County Jail recently changed its good-conduct reduction. Thus, that policy now conforms with the Department of Corrections system.

[3] That is, the ratio of 85 days served to 15 days earned (for example) can be restated as one day earned for every 5-2/3 days served.

bail and begin to serve their time in a state facility after sentencing.[4]

B. *Petitioners MacFarlane and Fogle*

Fogle and MacFarlane were unable to afford to post bail because of indigence and were, therefore, detained in county jails prior to trial and sentencing.[5] *In re Fogle*, 128 Wash.2d at 63. Both Fogle and MacFarlane received the maximum 15% good-conduct credit as general population county jail prisoners. Neither was eligible to participate in any program that would have allowed him to accumulate good-performance credit in the county jails. Fogle spent 102 pre-sentence days in the Pierce County Jail on a 60-month sentence and received 17 days of early-release time upon transfer to the state facility.[6] Had Fogle posted bail, not been held in custody until after sentencing, and then been committed to the state facility after sentencing, he would have earned 10 days for every 30 served, or 34 days of early-release credit for his good conduct during

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[4] On appeal, MacFarlane and Fogle primarily challenge the differences in the award of good conduct credits between the state facilities and the county jails, but they also challenge the inability of pre-trial detainees to earn good-performance credit.

[5] At oral argument, respondents questioned whether MacFarlane and Fogle would have been *eligible* for bail, even had they had the requisite funds. However, in the district court respondents did not raise this issue or in any way challenge the Washington Supreme court's assumption that MacFarlane and Fogle were unable to post bail simply because of their indigence. Thus, respondents waived this argument, and we do not consider it on appeal.

[6] The County originally awarded Fogle only 15 days' credit. This was later revised by the Washington Court of Appeals to 17 days to bring the calculation into conformity with the decision in *In re Williams*, 121 Wash.2d 655, 659, 853 P.2d 444 (1993), which requires that good-time credit be calculated on the basis of the total sentence, rather than the time served. This re-calculation was, again, erroneous: under the applicable formula, Fogle actually should have earned 18 days' credit for serving 102 days with good conduct. As we said above, for every 5-2/3 days served, he earned 1 day's credit. Therefore, we divide 102 by 5.667 to arrive at the amount of credit earned: 18.

his initial period of custody, or double the time he was credited with by the county jail. MacFarlane spent 144 pre-sentence days in the Clark County Jail prior to receiving concurrent 72- and 8-month sentences; the jail certified 21 days of early release credit.[7] Had MacFarlane been able to post bail, not been held in custody until after sentencing and then been committed to the state facility, he would have earned 10 days for every 30 served, or 48 days of early-release credit for good conduct during his initial 144 days in custody, or more than double the time he was credited with by the county jail. Petitioners challenge the constitutionality of the lesser award of early-release credit for the time they were detained in jail and seek credit equal to that which they would have received had they been able to post bail and serve their full sentences in state facilities.

C. *Prior Habeas Proceedings*

MacFarlane and Fogle filed separate personal restraint petitions in the Washington Court of Appeals, challenging the county jails' early-release policies as violative of equal protection, due process, and double jeopardy.[8] They contended that they were denied equal protection by not being awarded the amount of early-release time that state prisoners receive – one-third of their imposed sentences, Wash. Rev. Code 9.94A.150(1). The Court of Appeals rejected Fogle's equal protection claim, holding that county jails have plenary authority to develop procedures by which their prisoners can earn early-release credits and that Pierce County's system of

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[7] Although MacFarlane (unlike Fogle) did not challenge the county jail's calculation on appeal, and the calculation is for all practical purposed moot, given our holding, the county jail's calculation was erroneous under *In re Williams*, 121 Wash.2d 659. The jail did not subtract any days for misconduct; accordingly, MacFarlane is entitled to the full 15% credit, or 25.41 days (144 ÷ 5.667 = 25.41).

[8] Petitioners have not raised a double jeopardy claim on appeal. In order to decide the case, we need consider only the equal protection argument.

awarding such credits was constitutional. The Washington Supreme Court granted Fogle's petition for discretionary review, certified MacFarlane's petition, which was then pending in the Court of Appeals, and consolidated the cases for review.

In a 5-to-4 decision, the Washington Supreme Court determined that the county jails' policies granting pre-sentence detainees substantially less early release credit than that afforded under the state policy were statutorily and constitutionally permissible. *In re Fogle*. In resolving the equal protection claim, the court relied solely on earlier Washington cases, providing *no* citations to any federal cases. The court decided to apply the intermediate scrutiny standard, on the assumption that MacFarlane and Fogle were eligible for bail but financially unable to provide it, and that a semi-suspect classification, indigency, thus served as the basis for the disparate treatment. 128 Wash. 2d at 62. The court concluded that the counties' substantial interest in maintaining prisoner discipline sufficiently justified disparate treatment of pre-trial detainees to overcome the equal protection challenge, that disparate policies regarding the amount of good-conduct and good-performance credit to be awarded did not result in multiple punishment so as to trigger double jeopardy protection, and that the jails established and observed their written policies governing such credits in a manner consistent with due process requirements. *Id.* at 64-66.

The dissent analyzed the equal protection issue by examining whether the disparate treatment "may fairly be viewed as furthering a substantial interest of the State," citing *Plyler v. Doe*, 457 U.S. 202, 217-18 (1992). It found an equal protection violation, because it "fails to see how awarding a person who makes bail a more generous earned release credit than one who does not has any effect on jail discipline." 128 Wash.2d at 72

In August of 1996, MacFarlane and Fogle filed habeas corpus petitions in the U.S. District Court for the Western District of Washington; the petitions were then consolidated. The Magistrate Judge issued a Report and Recommendation recommending that respondents' motion for summary judgment be granted, on the assumption that the intermediate level of scrutiny applied by the Washington Supreme Court was consistent with *Bearden v. Georgia*, 461 U.S. 660 (1983), the clearly established federal law. District Judge Franklin D. Burgess issued a brief order approving the Report and entered judgment for respondents. Petitioners appealed.

II.

[1] Petitioners argue that the Washington Supreme Court's decision was "contrary to" clearly established federal law and, thus, under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), their applications for writs of habeas corpus must be granted. We agree that the state court's decision was contrary to clearly established federal law.

[2] AEDPA amended 28 U.S.C. § 2254(d) to provide that no habeas relief may be granted to a person in custody pursuant to a judgment of a state court unless the underlying state adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Neither party challenges the state court's determination of the facts. Our inquiry, thus, focuses first on whether there was clearly established federal law governing the issue presented here: whether the allowance of lesser early-release credits to defendants detained pre-trial in county jails because of financial inability to post bail than to more fortunate defendants, whose financial resources permitted them to wait to

begin serving their time until after commitment, post-sentencing, to a state correctional facility, violates equal protection. If there was clearly established federal law that applies to this question, then we must next decide whether the Washington Supreme Court's decision was contrary to, or constituted an unreasonable application of, it.

III.

[3] In *Bearden*, 46 U.S. at 671-72, the Supreme Court held that incarceration should not be imposed on an indigent individual solely because of that person's inability to pay. We conclude that *Bearden*, decided in 1983, and grounded in thirty years of precedents, was clearly established law governing the issue presented here at the time of the Washington Supreme Court decision denying petitioners' state habeas petitions.[9]

The petitioner in *Bearden* pleaded guilty to burglary and theft by receiving stolen property. The trial court sentenced him to three years' probation for the burglary charge, a concurrent one-year term of probation on the theft charge, and a $500 fine and $250 in restitution. Petitioner was to pay $100 on the day of sentencing, $100 on the following day, and the $550 balance within four months. Petitioner paid the first $200, but then lost his job, was unable to find other work and, therefore, notified the probation office that he would be late with his payment of the balance. After an evidentiary hearing,

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[9] The state, in its brief, asserts that petitioners' claims were not "exhausted" because they did not cite *Bearden* in the state court. This argument is without merit. Petitioners fully presented their equal protection claims to the state court. If a petitioner presented the same federal claim and underlying factual allegations in the state court, then the exhaustion requirement is satisfied. *See Picard v. Connor*, 404 U.S. 270, 276-78 (1971). "[E]xhaustion of remedies does not require that the state have had the opportunity to pass on the claim under the *particular authorities* advanced in the federal habeas court." *Hudson v. Rushen*, 686 F.2d 826, 830 (9th Cir. 1982) (emphasis added).

the trial court revoked probation for failure to pay the balance of the fine and restitution, entered a conviction, and sentenced petitioner to serve the remaining portion of the probationary period in prison. The state courts rejected petitioner's claim that imprisoning him for inability to pay the fine violated the Equal Protection Clause of the Fourteenth Amendment.

[4] In analyzing the case, the Supreme Court stressed the balance between the goal of punishment and the impermissibility of imprisoning a defendant solely because of a lack of financial resources. *Id.* at 661. *Bearden* delineated the factors to be balanced in examining an equal protection claim involving a lack of financial resources and the working of the criminal justice system: it requires a careful inquiry into (1) the nature of the individual interest affected; (2) the extent to which it is affected; (3) the rationality of the connection between legislative means and purpose; and (4) the existence of alternative means for effectuating the purpose. *Id.* at 666. Thus, *Bearden* both articulated guiding principles for analyzing equal protection claims brought by indigent defendants and applied them to the specific issue presented, which, like the issue presented here, concerned increased incarceration because of indigency. *Bearden* stresses the necessity of weighing alternatives to increased incarceration as a means of punishing the indigent. *Id.* at 671-72. In no uncertain terms, the Court held that to deprive a defendant of his freedom simply because, through no fault of his own, he cannot pay would be contrary to the Fourteenth Amendment's requirement of fundamental fairness. *Id.* at 672.

[5] Ninth Circuit case law also confirms that *Bearden* is clearly established law on the issue of incarceration based on indigency. For example, in *United States v. Parks*, 89 F.3d 570, 572-73 (9th Cir. 1996), we applied the principles of *Bearden* to find a constitutional violation when a defendant was assessed two extra criminal history points because, at the time he committed his offense, he was under a sentence of

"legal financial obligation" to pay state law fines, and the increase in his criminal history due to this outstanding financial obligation increased his Guidelines sentencing range for the new offense from 37-46 months to 46-57 months. We found that it was unconstitutional to add eight months of incarceration to a defendant's sentence solely because of indigence, stating that "[t]he application of Washington state's [legal financial obligation] as a criminal justice sentence . . . creates two classes of defendants for federal sentencing purposes: those who could afford to pay their state law fines immediately, and those who required a period of time to so." 89 F.3d at 572 & n.5.

[6] *Bearden* controls the analysis of whether and under what circumstances an individual can be subjected to greater incarceration solely because of indigency. Respondents, however, argue that no specific Supreme Court case compelled the Washington Supreme Court to apply *Bearden* to MacFarlane's and Fogle's petitions: "Petitioners fail to identify any United States Supreme Court case which applies the *Bearden* test to a disparate award of good conduct time between pretrial detainees in county jails and convicted felons in a state prison system." *Bearden*, as respondents note, does not address the identical factual situation presented here. If that were the standard, however, hardly any law would be "clearly established," for only cases presenting precisely the same facts could govern later cases. The Supreme Court has not defined "clearly established" in the AEDPA context, nor has this court directly opined on what constitutes "clearly established" law." We have, however, in several cases found "clearly established law", and, in doing so, have not required that the precedent arise from the identical factual circumstances. For example, in *Jeffries v. Wood*, 114 F.3d 1484, 1500-01 (9th Cir. 1997) (en banc), we held that *Chapman v. California*, 368 U.S. 18 (1967), was clearly established law regarding the burden of proof on prejudice in habeas cases. In *Davis v. Kramer*, 167 F.3d 494 (9th Cir.

1999), we held that *Anders v. California*, 386 U.S. 738 (1967), was clearly established law regarding the constitutionally mandated procedure that appellate counsel must follow if he determines that an appeal would be frivolous. *See also Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997) (*Faretta v. California*, 422 U.S. 806 (1975), "clearly established" a rule of law regarding the timeliness of a request for self-representation). These cases comport with the definition of "clearly established" in the *Teague* context, relied on by other circuits to determine whether there is clearly established law in the AEDPA context.[10] We agree in this respect with the First Circuit, which, drawing on the *Teague* line of cases, stated that a petitioner need not point a habeas court to a factually identical precedent, but rather that "clearly established" Supreme Court law often erects a framework intended for application to variant factual situations. *See O'Brien v DuBois*, 145 F.3d 16, 24 (1st Cir. 1998). *See also Neelley v. Nagle*, 138 F.3d 917, 922-23 (11th Cir. 1998) ("clearly established" terminology echoes the concerns underlying *Teague* and its progeny).

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[10] In both the *Teague* and qualified immunity contexts, the Supreme Court has determined that a precedent is "clearly established" if it compels a particular legal result. Under *Teague v. Lane*, 489 U.S. 288 (1989), a federal court generally may not apply a "new rule" of constitutional law to a habeas petition. Applying existing precedent to a different set of facts is not a new rule if the factual differences do not change the force with which the precedent's underlying principle applies. *See Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring). Similiarly, in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the Supreme Court specifically rejected the notion that a right can be clearly established for qualified immunity purposes only if "the very action in question has previously been held unlawful." The Court held, rather, that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The approach followed by Justice O'Connor in *Wright* and the Court in *Anderson* is equally applicable to the AEDPA context.

[7] Respondents fail to show that there is any meaningful distinction between the case of a poor person unable to pay a fine, who, as a result, suffers longer incarceration than a similarly situated affluent person (*Bearden*) and the case of a poor person unable to post bail pre-trial who, as a result, suffers longer incarceration than a similarly situated affluent person (*MacFarlane* and *Fogle*). *Bearden* erected the framework intended for application where a defendant suffers increased incarceration because of indigency and, thus, is clearly established law governing the issue presented here.[11]

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[11] Respondents argue that *McGinnis v. Royster*, 410 U.S. 263 (1973), decided ten years before *Bearden*, controls this case. *McGinnis* is informative, but distinguishable. *McGinnis* considered the constitutionality of section 230(3) of the New York Correction Law, which denied appellee state prisoners early-release credit for their pre-sentence incarceration in county jails in computing the "minimum parole date," but allowed such credit in calculating the "statutory release date." The state argued that the denial of early-release credit to county detainees was based on the fact that county jails in New York, unlike state prisons, had no rehabilitative programs. The Supreme Court held that this statute was rationally justified on the ground that the risk of prematurely releasing unrehabilitated or dangerous criminals may well be greatest when the parole decision is made before the minimum sentence expires. *McGinnis*, however, decided 12 years before *Bearden*, was not about indigency: although appellees Royster and Rutherford appear to have been unable to post bail because of indigency, 410 U.S. at 266-67, the issue was not framed as one of disparate treatment of indigent prisoners, nor did the Supreme Court so analyze it. Rather, the issue presented involved the denial of early-release credit to the broad class of state prisoners detained in county jails, for whatever reason, prior to trial or prior to sentencing. The Supreme Court, therefore, applied the rational basis test. The petitioners here, as the Washington Supreme Court recognized, explicitly claim an equal protection violation based on their indigency. This is not to say that the Supreme Court in *McGinnis* could not have treated the case as one about indigency and analyzed the issue in this light, but it did not do so and, therefore, is not on point. It is probably for that reason that the Supreme Court did not mention *McGinnis* when it decided *Bearden*. Finally, we do not know, of course, what the Supreme Court would have held had it analyzed *McGinnis* under the *Bearden* standard.

IV.

[8] We turn now to the question whether the Washington Supreme Court's denial of MacFarlane's and Fogle's habeas petitions was contrary to, or an unreasonable application of, *Bearden*. The Washington Supreme Court conducted a full review of MacFarlane's and Fogle's claims, but did not mention *Bearden*, nor any other federal case in its opinion. The state court applied an intermediate level of scrutiny; it was on this basis that the district court concluded that the state court's decision was consistent with *Bearden*. But heightened scrutiny is not all that *Bearden* stands for: the state court failed to identify or apply the factors that must be weighed under *Bearden* in determining whether equal protection has been violated by a wealth-based classification, namely, "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." 461 U.S. at 666-67. Indeed, the state court failed to consider petitioners' interest at all, or to examine the connection between the legislative means and objectives. In addition, the state court did not consider any alternative means for accomplishing the penological purposes that it identified. When the state court fails to apply a controlling Supreme Court authority, we must examine its decision in light of that authority. Here, we must apply the *Bearden* factors to determine whether petitioners' right to equal protection was violated by the counties' early-release policies, which limited pre-sentence detainees to a maximum good-conduct credit of 15% of the sentence imposed and prohibited them from participating in good-performance programs. We will consider the good-conduct credit first, because good performance is less directly involved here and involves significantly different issues for those in charge of the jails.

[9] First, the nature of the individual interest affected here – physical liberty – weighs heavily in the constitutional calculus; the state's interests must be highly significant if they are to outweigh this fundamental interest. The Supreme Court has repeatedly found wealth discrimination unconstitutional when additional incarceration is caused solely by disparities in wealth. *See e.g., Williams v. Illinois*, 399 U.S. 235 (1970) (unconstitutional for state to add time to maximum prison term solely because the defendant involuntarily failed to pay fine or costs); *Tate v. Short*, 401 U.S. 395, 398 (1971) (jailing the defendant for involuntary failure to pay fines on non-jail offenses unconstitutionally imprisons "solely because of . . . indigency"). The crucial factor here is that the additional incarceration is caused solely by the petitioners' indigency: had they posted bail and served their entire sentences in a state facility, they would have been required to serve less time.

[10] Second, as to the extent to which petitioners' interest (their physical liberty) was affected, although from our perspective 30, 40, or 50 days more or less on a 5-year or 6-year term of imprisonment may seem negligible, even a single extra day of incarceration is of substantial significance for constitutional purposes. Had Fogle posted bail, served no time in the Pierce County Jail, and been committed directly to the state facility after sentencing, his incarceration would be shorter by 16 days. Had MacFarlane posted bail, served no time in the Clark County Jail, and been committed directly to the state facility after sentencing, his incarceration would be reduced by approximately 23 days.

[11] Third, the state court's failure to examine the rationality of the connection between the claimed legislative purposes and the good-conduct policy contributed significantly to its error. According to the state, two primary purposes motivate the sentencing statute in general, and the county jails' good-conduct (and good-performance) policies in particular: discipline and local control. The first purpose, maintaining

prisoner discipline, has no rational connection to affording county pre-trial detainees *less* good-conduct credit; in fact, one might reasonably assume the contrary, that increasing the amount of good-conduct credit available would increase inmates' incentive to behave well and, thus, reduce disciplinary problems. The second purpose, local control, is only weakly connected to the counties' calculation of good time credit for detainees who serve most of their sentences in state facilities. The county jails have little rational interest in how much credit for good conduct is ultimately to be received by their *former* inmates who have moved to the state system to serve the principal portions of their sentences. The county jails can, and do, exert individual control over what constitutes good conduct, and whether a particular inmate has met that standard, but it is illogical to contend that the ultimate calculation of the maximum amount of good conduct time to which a prisoner who has earned good conduct credit and who is no longer in county jail is entitled could endanger – or, alternatively, further – local control. Moreover, to the minor degree, if any, an interest in local control is implicated, that interest in substantially outweighed by the prisoner's interest in liberty and freedom from punishment on account of indigency.

[12] Finally, there are alternative means to accomplish the legislative purposes that would not involve additional incarceration time for those who are unable to make bail and whose conduct is satisfactory during their stays in county jail. As we have noted, to assuage any concerns regarding discipline, the counties can (and do) deny good-conduct time entirely to detainees who present disciplinary problems, and counties can revoke or restrict the privileges of such individuals. As to local control, a minimal interest, at most, underlies the good-conduct policy. In addition, as the dissenting justices of the Washington Supreme Court pointed out, when a prisoner is transferred post-sentencing from a county jail to a state facility, the county could forward to the Department of Corrections a statement containing the total

number of days the prisoner spent in the jail and the number of days on which he did not earn good-conduct credit. The Department of Corrections could then itself calculate the total amount of credit for good conduct that the prisoner should receive under the applicable state policies and credit that amount of time against the time to be served. *In re Fogle*, 128 Wash. 2d at 73.

V.

[**13**] Our application of the legal rules prescribed by *Bearden* clearly requires the conclusion that the good conduct policies challenged by MacFarlane and Fogle violate equal protection. The Washington Supreme Court's failure to apply *Bearden*, and its resultant decision that the county jails' good-conduct policies did not violate equal protection, was "contrary to . . . clearly established . . . Federal law" within the meaning of 28 U.S.C. § 2254(d). Such a failure to identify or apply the governing Supreme Court standard unquestionably falls within the "contrary to" provision of AEDPA. *See Jeffries*, 114 F.3d at 1500-01 (where the Washington Supreme Court had failed even to cite *Chapman* or to identify the correct harmless error standard set forth in that case, we held that the "contrary to" law provision applied). This court has not, however, attempted to define the outer boundaries of the "contrary to" provision, nor need we do so here. We also have not sought to draw a rigid distinction between the "contrary to" and "unreasonable application of" provisions, both of which reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court. Indeed, we have stated that there is an overlap in the scope of the two provisions. *See Davis*, 164 F.3d 494. Again, however, because the "contrary to" provision is clearly met, we need not consider whether such an overlap exists here.

VI.

[14] MacFarlane and Fogle also challenge the counties' good-performance policies, which raise the same constitutional question as the good-conduct policies, but require a different answer.

[15] Under the policy in force in both Pierce County and Clark County, pre-sentence detainees are ineligible for participation in work or other programs through which they could earn good-performance credit. This ineligibility prevents those detainees from earning the additional early-release credit that can be earned by persons who serve their entire sentences in a state facility. The nature of the individual interest affected by the good-performance policy is, of course, the same as that affected by the good-conduct policy: physical liberty and freedom from incarceration. The crucial difference, for purposes of our *Bearden* analysis, lies in another factor: the relationship between the policy's objectives and the means that it employs to achieve them. The counties assert that concerns over community safety and the risk of flight primarily underlie their refusal to permit pre-sentence detainees to participate in good-performance programs, which frequently entail allowing inmates to work outside the jails. They point out significant differences in the composition of the pre-sentence detainee population, which may include murderers, rapists, and career offenders, and the larger population of convicted inmates who have been sentenced to serve a comparatively small amount of time (one year or less) in the county jail. The counties have established a strong rational connection between the legislative means and purpose. Similarly, an individual county's ability to decide on eligibility to participate in a good-performance program, and in what circumstances, during periods of detention in that county's jail, is closely tied to local control, given the myriad variables involved in allowing a prisoner to work or attend an academic program and the commitment of local resources that may be required to administer the

programs. Furthermore, unlike in the case of the good conduct policies, no alternative means are readily identifiable for accomplishing the counties' objectives – ensuring community safety and preventing flight – while permitting inmates to participate in work or other "performance" programs. We conclude, therefore, that as to the good-performance policies the counties' interests in community safety and prevention of flight outweigh petitioners' interest in physical liberty. Thus, the good-performance policies, unlike the good-conduct credit policies, do not violate the Equal Protection Clause.

VII.

The district court's decision is reversed as to the counties' good-conduct policies and affirmed as to their good-performance policies. The Department of Corrections must calculate the amount of credit for good conduct that the petitioners would have received had they been subject to the state good-conduct policy for the period of time they spent in the county jails, and must credit that amount of time against the time served.

REVERSED IN PART, AFFIRMED IN PART.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DONALD D. MACFARLANE, Petitioner, v. KAY WALTER, Respondent.	Case No. C96-5688FDB Case No. C96-5766FDB (CONSOLIDATED) REPORT AND RECOMMENDATION
JAMES N. FOGLE, Petitioner, v. KENNETH DUCHARME, Respondent.	

INTRODUCTION AND SUMMARY CONCLUSION

Petitioners are state prisoners currently in the custody of the Washington State Department of Corrections (DOC) pursuant to valid convictions. They allege defendants denied them equal protection and due process under the Fourteenth Amendment and violated their Fifth Amendment right against double jeopardy by inaccurately awarding earned early release credit. They contest the earned early release policies that allow prisoners who are financially able to post bail and subsequently serve their entire sentences in a DOC facility to receive more earned early release credit than those prisoners who are financially unable to post bail and are incarcerated prior to sentencing in county jails. Respondents have moved for summary judgment and petitioners have opposed the motion. After a careful review of the record, I conclude that the Washington Supreme Court decision upholding the county jail calculation of earned early release credit was not contrary to nor did it involve an unreasonable application of clearly established federal law as determined by the Supreme Court. Respondents' motion for summary judgment should be granted and the petition denied.

THE WASHINGTON SENTENCING AND GOOD TIME SYSTEM

The State of Washington currently operates a determinate sentencing system under the Sentencing Reform Act of 1981, Chapter 9.94A RCW. Under this system, persons convicted of felonies receive a sentence of a specific number of months based upon a sentencing grid contained in the SRA.

When a sentence exceeds twelve months, the prisoner must serve the sentence in a DOC facility. RCW 9 94A.190(1). However, prior to sentencing, many prisoners who are ultimately confined in a DOC facility serve time in a county jail because they have not posted or have been denied bail.

A sentence imposed under the SRA may be reduced if a prisoner is credited with early release credit, or "good time." RCW 9.94A.150(1) authorizes correctional agencies to develop

procedures for implementing a system of granting early release credits, which will reduce the sentence imposed by the amount of early release credits earned.

> The term of a sentence of an offender committed to a correctional facility operated by the department (DOC), may be reduced by earned early release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined. The earned early release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned early release credits in advance of the offender actually earning the credits. Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration. If an offender is transferred from a county jail to the department of corrections, the county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned early release time. In the case of an offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, the aggregate earned early release time may not exceed fifteen percent of the sentence. In no other case shall the aggregate earned early release time exceed one-third of the total sentence. RCW 9.94A.150(1).

Pursuant to RCW 9.94A.150(1), DOC and the county jails have developed independent credit policies. DOC's earned early release credit system consists of two types of credit: good-conduct time and earned time. A prisoner in a DOC facility earns good-conduct time for good behavior at ten days per thirty days served; and an additional five days per thirty days served in earned time for participation in work, academic, or treatment programs. In re Cromeenes, 72 Wn.App. 353, 355 (1993). DOC then combines the total good-

conduct and earned time to determine the final sentence reduction, up to the statutory maximum of one-third of the imposed sentence. In re Williams, 121 Wn. 2d 655, 659 (1993); Cromeenes, 72 Wn.App. at 355; RCW 9.94A.150(1).

The Clark and Pierce County jails use tiered credit systems to award early release credits, also known as good-conduct time. The base award available to all general population prisoners for good-conduct time is a maximum of 15 percent of the imposed sentence, and the jail will deduct any days a prisoner is penalized for misconduct from this good-conduct time. These jails also allow prisoners to receive additional credit through work programs. When the credit from the good-conduct and work programs is combined, Clark County jail allows inmates to achieve a maximum early release credit of thirty percent of the imposed sentence and Pierce County jail allows up to twenty or thirty percent, depending on the type of work or other program involved.

A prisoner denied or unable to post bail will spend presentence detention in a county jail and then transfer to a DOC facility upon sentencing. DOC will credit a prisoner with day-for-day credit for time served in the county jail as well as earned early release credit earned in presentence detention in the county jail, and then combines that amount with earned early release credit accumulated at the DOC facility to come up with the total amount of early release credits to be applied to the sentence. Williams, 121 Wn.2d at 658-59; State v. Phelan, 100 Wn.2d 508, 517 (1983).

The parties have not contested the finding in In re Fogle, 128 Wn.2d 56, 63 (1995), that most inmates in Clark and Pierce County jails, especially presentence detainees, do not achieve work program status. Therefore, maximum credit earned by inmates in presentence detention in these county jails is fifteen percent.

While persons unable to post bail set by the court are held in county jails prior to sentencing, there are other reasons why people will be held in a county jail prior to sentencing, for example, a person charged with a crime may elect not to pay bail for reasons other than financial condition, or bail may not be set due to perceived dangerousness and likelihood of flight, or. Id.

FACTUAL AND PROCEDURAL HISTORY

Petitioners were unable to afford to post bail, and were therefore detained in the county jails prior to trial and sentencing. The Washington Supreme Court noted there was some dispute whether defendants were eligible for bail. However, the state court construed the facts in the light most favorable to petitioners and, in essence, found as a predicate to its decision that bail was set and petitioners were unable to pay bail. *See* In re Fogle, 121 Wn.2d at 63 (applying an intermediate level of scrutiny and construing the facts in favor of petitioners on their eligibility for bail). This Court will defer to the Washington Supreme Court's determination of these factual issues.

Petitioner MacFarlane spent 144 presentence days in the Clark County Jail on a 72-month sentence, earning 21 days earned early release credit (144 days x 15% = 21 days). He received the maximum amount of credit allowed a pretrial detainee and no time was deducted for misconduct. This calculation was then forwarded to DOC upon petitioner's transfer there. Had petitioner posted bail, served no time in the Clark County Jail, and been committed to DOC immediately after sentencing, he could have earned a maximum of fifteen days per thirty served in the county jail, or 72 days, but that amount could be adjusted to keep the aggregate of earned release time within the one third statutory limit of RCW 9.94A.150(1). See In re Fogle, 121 Wn.2d at 59-60. As a result, had he spent his entire sentence in a DOC facility, his sentence may have been shortened by as much as 51 days.

Petitioner Fogle spent 102 day of presentence detention in the Pierce County Jail on a 60-month sentence, and, following a recalculation order by the Court of Appeals, was credited with fifteen days of early release credit (102 days x 15% = 15 days). He received the maximum amount of credit allowed a pretrial detainee and no time was deducted for misconduct. Had petitioner posted bail, served no time in the Pierce County Jail, and been committed to DOC immediately after sentencing, he could have earned a maximum of fifteen days per thirty days served in the county jail, or 51 days, but that amount could be adjusted downward to keep the aggregate of earned release time within the statutory limit of RCW 9.94A.150(1). As a result, had he spent his entire sentence in a DOC facility, his sentence may have been shortened by as

much as 36 days.

Defendants filed separate personal restraint petitions in the Court of Appeals, challenging the county jails' earned early release policies. The Court of Appeals granted petitioner Fogle's petition in part because the jail had inaccurately calculated his credit, and ordered readjustment. The Washington Supreme Court granted petitioner Fogle's petition for discretionary review and certified petitioner MacFarlane's petition, consolidating the cases for review. In In re Fogle, *supra*, the Court determined that the county jails' policies granting presentence detainees earned early release credit less than the maximum available under DOC policy was statutorily permissible; the state's substantial interest in maintaining prisoner discipline justified disparate treatment of presentence detainees to overcome equal protection challenge; disparate earned early release policies did not result in multiple punishment to trigger double jeopardy protection; and the jails established and observed their written earned early release policies consistent with due process requirements.

Petitioners have filed petitions for writ of *habeas corpus*, and these actions have been consolidated for decision. The issues have been exhausted in state court. *See* 28 U.S.C. § 2254(b)(1). Defendants have moved for summary judgment and petitioners have opposed the motion.

PETITION

Petitioners claim that Pierce and Clark County jails prohibit pretrial detainees, who are unable to afford bail and will ultimately be sentenced to a DOC facility, from earning the maximum one-third reduction in sentences while those persons who are able to post bail may avoid spending time in a county jail and will then be able to earn the statutory maximum of one-third reduction in sentence because they spend their entire sentences in a DOC facility. They claim the counties cannot categorically make prisoners headed for state prison completely ineligible for a one-third reduction, because such categorical ineligibility results in additional incarceration not imposed on those with sufficient resources to post bail. As a result, petitioners claim the county good time policies create unconstitutional wealth discrimination, and constitute double jeopardy.

STANDARD OF REVIEW

Summary judgment may be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

Federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. Engle v. Isaac, 456 U.S. 107 (1983). A federal court may entertain an application for writ of habeas corpus only on the ground that the petitioner is in custody in violation of the constitution or law or treaties of the United States. 28 U.S.C. § 2254(a).

DISCUSSION

1. Scope of Federal Review Under 28 U.S.C. §2254

28 U.S.C. §2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. I, effective April 24, 1996, governs the scope of federal review with respect to issuing writs of habeas corpus.

28 U.S.C. §2254(d), provides as follows:

> An application of a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Neither petitioners nor respondents challenge the reasonableness of the state court factual determinations under

Section 2254(d)(2). The scope of review in this case relates to the interpretation of Section 2254(d)(1), which relates to federal review of questions of law and review of mixed questions of law and fact.

Contrary to Law Standard

As specified in Section 2254(d)(1), a writ of habeas corpus may not be granted unless the adjudication of the claim resulted in a decision that was contrary to clearly established law as determined by the Supreme Court. This provision governs federal review of questions of law determined by the state court. *See* Moore v. Calderon, 1997 WL 100939, n. 3 (9th Cir.).

Respondents argue the federal court should defer to a state court decision if it is not contrary to a directly controlling decision of the Supreme Court. Petitioners contend the federal court has power to conduct a plenary review of the federal legal issues.

With respect to issues of law, the federal court reviews the legal issues independently in the context of the state court decision. *See* Lindh v. Murphy, 96 F.3d 856, 868-69 (7th Cir. 1996), *cert. granted* 117 S.Ct. 726 (1997). Accordingly, to determine whether a state court decision was contrary to clearly established Federal law as determined by the Supreme Court, the federal court must first look to the decisions of the Supreme Court to determine whether the issues raised in the petition have been addressed, then determine whether the Supreme Court's position has been clearly established, and proceed to consider whether the state court decision was contrary to that clearly established law. *See* Moore, 1997 WL 100939 at 2-3. How "directly controlling" a Supreme Court decision or decisions must be depends upon the nature of the issues and the constellation of Supreme Court decisions relating to those issues. *See* majority and dissenting opinions in Blankenship v. Johnson, 106 F.3d 1202 (5th Cir., Feb. 20, 1997).

Unreasonable Application of Law Standard

Section 2254(d)(1) also provides that a writ of habeas corpus may not be granted unless the adjudication of the claim resulted in a decision that involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. This provision governs the scope of federal review of questions of mixed law and fact. Moore, 1997 WL 100939 at n. 3; Lindh, 96 F.3d at 870.

Petitioners argue such mixed questions of law and fact warrant independent review by the federal court. They contend a narrow reading of the scope of review which would require the federal court to defer to a state court interpretation of the application of constitutional law threatens the inherent powers of the court, undermines the independence of the federal judiciary, and violates due process. Respondents contend that this provision requires federal courts to defer to state court application of the law to the facts, as long as that decision was reasonable.

In Lindh, *supra*, the 7th Circuit concluded that, although federal courts are entitled to interpret the law independently, Section 2254(d)(1) regulates relief. "It tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called 'unreasonable'." Lindh, 96 F.3d at 870. *See also* Gomez v. Acevedo, 106 F.3d 192, 199 (7th Cir., Feb. 3 1997) (A responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment."); Moore, 1997 WL 100939 at n. 3 ("unreasonable application of law" language governs mixed questions of law and fact as opposed to "contrary to" language which governs questions of law): Berryman v. Morton, 100 F.3d 1089, 1103 (3rd Cir., Nov. 14, 1996) (federal habeas court must defer to the state court's determination of a mixed question of law and fact where that determination is reasonable, i.e. within the boundaries of the law established by the Supreme Court); Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996) (unreasonable decision must be "so clearly incorrect that it would not be debatable among reasonable jurists"). It should be noted, however, that this deferential standard of review has not been universally accepted. *See* dissenting opinion of Judge Ripple, Lindh, 96 F.3d at 885 *et seq.* The Supreme Court has granted review in Lindh. 117 S.Ct. 726 (1997).

It is often difficult to determine when a question is one of law or one of mixed law and fact. The court in Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir., Sept. 4, 1996), issued a writ based upon ineffective assistance of counsel, and concluded that, even if new Section 2254(d)(1) applied to the case, "the state court decision was contrary to clearly established federal law determined by the Court in Strickland." On the other hand, the court in Mitchell v. Prouty, 1997 WL 78444 (9th Cir., Feb. 26, 1997); determined the writ should issue because evidence was insufficient to support a conviction under Jackson v. Virginia, 443 U.S. 307 (1979); the court concluded that, if the amended Section 2254(d)(1) applied to the case, the state court decision was an unreasonable application of clearly established Federal law. Mitchell, 1997 WL 78444 at n 3. Both courts Baylor and Mitchell cited to clearly established law and applied the law to the factual scenarios before them, but the Baylor court concluded that, even if the new Section 2254 (d)(1) applied, the state court decision was contrary to law while the federal court in Mitchell found the state court decision and unreasonable application of the facts to the law.

The Lindh, *supra*, court addressed this difficulty. When the constitutional question appears to be a matter of degree rather than entitlement, a reasonable decision of a state court must be honored. Lindh, 96 F.3d at 871.

> When the subject is painted in shades of grey, rather than in contrasting colors, a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment. Think of the Speedy Trial Clause of the Sixth Amendment, which after Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), does not prescribe a rule for "how long is too long" but rather establishes a list of factors to consider. The Supreme Court of the United States sets the bounds of what is "reasonable"; a state decision within those limits must be respected--not because it is right, or because federal courts must abandon their independent decisionmaking, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is

> reserved for grave occasions. That is the principal change effected by §2254(d)(1). *Id.*

At this time, the interpretation of Section 2254(d)(1) by most authorities is to require federal courts to defer to a state court's application of facts to the law, provided there was a full and fair opportunity to litigate, and a reasonable decision, particularly when a Supreme Court precedent requires analysis and balancing of several factors. Therefore, to determine whether a decision involved an unreasonable application of clearly established Federal law as determined by the Supreme Court, the federal court determines what the governing Supreme Court law is with respect to the issue presented, and then determines whether the state courts have unreasonably applied that law.

2. Equal Protection and Due Process

When a state creates a right to good time, a prisoner's interest in good time credits is a liberty interest under the Fourteenth Amendment. Wolff v. McDonnell, 418 U.S. 539, 557 (1974). In Washington, the statutory right to good time credits constitutes a liberty interest. In re Anderson, 112 Wn.2d 546, 548 (1989). Petitioners therefore have a liberty interest in the good time credits they have been awarded or unlawfully denied.

The Equal Protection clause of the Fourteenth Amendment requires that all persons similarly situated be treated similarly by the government. Inmates are protected under the Equal Protection Clause against invidious discrimination. Wolff v. McDonnell, 418 U.S. at 556 (1974); Lee v. Washington, 390 U.S. 333, 334 (1968).

Petitioners argue the Clark and Pierce County jails and DOC, pursuant to their authorization under RCW 9A.94A.150(1), have established a system for awarding earned early release credit that renders pretrial detainees who are financially unable to post bail also unable to earn a maximum amount of early release credits while those persons who are financially able to post bail have an opportunity to earn that maximum amount. As such, they contend a class is created based upon wealth and they maintain the proper test to be applied is set forth in Bearden v. Georgia, 461 U.S. 660 (1983). Respondents contend the class at issue here is not based upon

wealth but is the class of pretrial/presentence detainees. Because the county jails have an a legitimate interest in controlling the behavior of the jail population, they contend a tiered system of granting good time credits that does not permit pretrial detainees to earn credits based upon work assignments is rationally related to a legitimate governmental purpose, and survives equal protection scrutiny.

When a classification or differing treatment with respect to a liberty interest is at issue, the liberty interests and classification interests converge. Bearden, 461 U.S. at 665. When the classification is based upon wealth, the court must carefully inquire into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, (and) the existence of alternative means for effectuating the purpose." Bearden, 461 U.S. at 666-667, *quoting* Williams v. Illinois, 399 U.S. 235, 260 (1970); M.L.B. v. S.L.J., 117 S.Ct 555 (1996).

The equal protection issue presented here was raised before the Washington Supreme Court in In re Fogle, *supra.* The first inquiry in this *habeas corpus* proceeding is whether the state court chose the appropriate clearly established law as determined by the Supreme Court. While the state court determined that failure to pay set bail "does not necessarily represent a wealth-based classification to merit semi-suspect status," the court then construed the facts in favor of petitioners and, in essence, found they were unable to afford to pay bail. In light of those facts, the court applied an intermediate level of scrutiny. Fogle, 121 Wn.2d at 63. In essence, the state court assumed petitioners were denied bail on a wealth based classification, and applied an intermediate level of scrutiny. The intermediate level of scrutiny is consistent with the standard set forth in Bearden v. Georgia, *supra.* Accordingly, the choice of controlling law was not contrary to clearly established law as determined by the Supreme Court pursuant to 28 U.S.C. §2254(d)(1).

In applying the facts to the law, the state court concluded that the system of awarding good time credits did not result in longer sentences, although it could have potentially resulted in petitioners having to serve more of their sentences. Fogle, 121 Wn. 2d at 63-64. The court then recognized the importance of allowing local jails to control their own inmate population and

concluded that the tiered system for awarding good time credits advances discipline by providing county inmates an incentive to improve behavior and earn work program participation. Fogle, 121 Wn.2d at 64. Because pretrial detainees may be particularly unsuitable for work incentive programs due to risk of flight, the court concluded the county jails are best suited to make the determination to exclude them from earning credit through work programs. Fogle, 121 Wn.2d at 64.

If this Court had applied an independent standard of review under Bearden, *supra*, the system for awarding good time credit presented by this case would not have survived an equal protection challenge because the court would have balanced the factors differently than did the majority in Fogle, *supra*. While the county jails' decision to preclude pretrial detainees from work assignments would be supported because that decision is related to the important governmental interest in controlling an managing behavior of inmates, the work program decision is separate from the calculation to be applied to good behavior credits an inmate has accumulated in the county jail once the inmate has been transferred to a DOC facility. The county jail has no interest in the formula that DOC applies to the good time its inmates earned as a result of good behavior when the inmates were incarcerated prior to sentencing. As the dissent in Fogle, *supra*, suggested, when a prisoner is transferred post sentencing from a county jail to a DOC facility, the county could forward to DOC the number of days spent in the jail and any deductions related to disciplinary actions; DOC would calculate the amount of credit for good behavior that the inmates would have received had they been subject to DOC earned early release time policies regarding good behavior for that period of time; and credit that amount of time against the time served. Fogle, 121 Wn.2d at 73. Because the formula to be applied once a prisoner is transferred from the county jail to a DOC facility would not impact the county jail disciplinary system, the purpose of local control of county jail is not affected one way or the other by the formula that is applied to good-conduct time once the prisoner is transferred to a DOC facility. Further, this alternative of calculating good conduct time by using a DOC formula once the prisoner is transferred to a DOC facility would not present an undue burden on either the county jail or the DOC facility.

However, this Court is precluded from applying an independent review of this mixed question of law and fact by 28 U.S.C. §2254(d)(1). This Court cannot conclude that the

majority in Fogle, *supra*, unreasonably applied the facts to clearly established law as determined by the Supreme Court. The state court looked at the interest involved and concluded the interest in obtaining good time credits was not the same as would be an interest created in actually lengthening a sentence imposed. The court then weighed the interest of the counties in developing and maintaining a system of managing its own inmates and found this to be of great importance. The issues were fully presented and entertained. Based upon the importance the state court placed on local control by county facilities, this Court cannot conclude the majority decision in Fogle, *supra*, was an unreasonable application of Bearden, *supra*.

3. Double Jeopardy

Petitioners contend that, when a state legislature provides for the earning of good time credits, the good time becomes part of all criminal sentences to which the statute applies. Because Washington has chosen to allow all persons convicted of felonies and sentenced to more than one year to earn good time up to a maximum of one-third of their total sentence, they contend that denying prisoners the opportunity to earn the good time causes the punishment imposed upon them to exceed that authorized by the legislature, and therefore violates the Double Jeopardy clause.

The Fifth Amendment prohibition against double jeopardy protects against multiple punishments for the same offense. The governing Supreme Court law is North Carolina v. Pearce, 395 U.S. 711 (1969). Under that law, punishments already exacted must be fully credited toward the sentence imposed. Pearce, at 718-19.

The state court in Fogle, *supra*, cited its prior decision State v. Phelan, 100 Wn. 2d 508 (1983), which interpreted the standard articulated in Pearce, *supra*. In Phelan, *supra*, the state court concluded that double jeopardy demands full credit for presentence jail time as well as earned early release time actually earned. Petitioners' argument would extend double jeopardy protection to the good time prisoners could have earned had they been subject to a different method of calculation. This argument would have merit only if the petitioners' equal protection argument had prevailed and petitioners were entitled to the credit authorized by RCW 9.94A.150(1). Further, RCW 9.94A.150(1) merely authorized a correctional agency to develop a procedure

to award early release credits but neither mandated they be awarded nor established they be awarded according to a set schedule.

The Washington Supreme Court's decision in Fogle, *supra*, properly concluded Pierce, *supra*, is the governing law related to double jeopardy. The failure of the court to extend Pierce, *supra,* to credits not earned was not an unreasonable application of the facts to clearly established federal law as determined by the Supreme Court.

CONCLUSION

The Washington Supreme Court concluded the county jails' system awarding a lesser amount of earned early release credits to pretrial detainees unable to afford to post bail than could be earned by persons able to post bail and serve their entire sentences in a DOC facility did not violate equal protection or due proces, and did not constitute double jeopardy. This decision was not contrary to nor did it involve an unreasonable application of clearly established federal law as determined by the Supreme Court. Respondents' Motion for Summary Judgment should be granted and the case dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this ___ day of April, 1997.

/s/ J. Kelley Arnold
J. Kelley Arnold
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DONALD D. MACFARLANE, et al., Petitioners, v. KAY WALTER, et al., Respondents.	NO. C96-5688FDB ORDER APPROVING REPORT AND RECOMMENDATION AI GRANTING SUMMARY JUDGMENT TO RESPONDENTS

This matter comes before the court upon the Report and Recommendation of the Honorable J. Kelley Arnold, United States Magistrate Judge. Judge Arnold recommends that these Petitions be dismissed upon the summary judgment motion of the respondents. The petitioner, through counsel, have filed objections to the Report and Recommendation: It is hereby

ORDERED:

(1) The court adopts the Report and Recommendation;

(2) The respondents' Motion for Summary Judgement is GRANTED and the consolidated Petitions dismissed; and

(3) The clerk of court is directed to send copies of this order to the counsel for the petitioners and the respondents, and to the Honorable J. Kelley Arnold.

DATED this 9 day of June, 1997.

/s/ Franklin D. Burgess
FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

[FILED]
NOV –2 1995

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint Petition of JAMES N. FOGLE, Petitioner. In the Matter of the Personal Restraint Petition of DONALD D. MacFARLANE, Petitioner.	62191-8 En Banc Filed NOV – 2 1995

DOLLIVER, J. – Following this court's decision in In re Mota, 114 Wn.2d 465, 472, 788 P.2d 538 (1990), holding the Department of Corrections' (DOC) denial of earned early release credit to presentence detainees in county jails violated equal protection, the Legislature amended the sentencing statute to authorize the county jails to establish earned early release credit policies. RCW 9.94A.150(1). Now we are asked to review the constitutionality of those county jail policies: presentence detainees receive earned early release credit, but less than that available under DOC policy. We hold county jail policies setting a maximum earned early release credit lower than the DOC policy are statutorily and constitutionally

permissible.

As mandated by Mota, the Legislature requires all prisoners, including those in presentence detention, be eligible for earned early release credit whether held in a DOC facility or a county jail:

> Except as otherwise provided for in subsection (2) of this section, the term of the sentence of an offender committed to a correctional facility operated by the department, may be reduced by earned early release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined. The earned early release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned early release credits in advance of the offender actually earning the credits. Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration. If an offender is transferred from a county jail to the department of corrections, the county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned early release time. In the case of an offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, the aggregate earned early release time may not exceed fifteen percent of the sentence. In no other case shall the aggregate earned early release time exceed one-third of the total sentence [.]

RCW 9.94A.150(1).

Pursuant to RCW 9.94A.150(1), the DOC and the county jails have developed the independent credit policies at issue here. The DOC's earned early release credit system, also known as "good-time", consists of two types of credit: good-conduct time and earned time. A prisoner in a state facility earns "good-conduct time" by good behavior at 10 days per 30 days served; generally, the prisoner is presumed to have earned the full good-conduct time available unless the facility specifically deducts for misbehavior. In re Cromeenes, 72 Wn. App. 353, 355, 864 P.2d 423 (1993). The DOC will award an additional 5 days per 30 days served in "earned time" for participation in work, academic, or treatment programs. Cromeenes, 72 Wn. App. at 355; RCW 9.95.070. The DOC then combines the total good-conduct and earned time, up to one-half of the days served, to determine the final sentence reduction, up to the statutory maximum of one-third of the imposed sentence. In re Williams, 121 Wn.2d 655, 659, 853 P.2d 444 (1993); Cromeenes, 72 Wn. App. at 355; RCW 9.94A.150(1).

A prisoner denied or unable to pay bail will spend presentence detention in a county jail and then transfer to a DOC facility upon sentencing. In that case, the DOC will reduce the prisoner's sentence not only for earned early release credit accumulated at the DOC facility, but also for day-for-day credit and earned early release credit earned in presentence detention. Williams, 121 Wn.2d at 658-659; State v. Phelan, 100 Wn.2d 508, 517, 671 P.2d 1212 (1983). Defendant James N. Fogle spent 102 days of presentence detention in the Pierce County Jail on a 60-month sentence, earning 15 days earned early release credit. Defendant Donald D. MacFarlane spent 144 presentence days in the Clark County Jail on concurrent sentences of 72 and 8 months, earning 21 earned early release credit days.

Like the DOC, the Clark and Pierce County Jails use tiered credit systems. The jails' version of good-conduct time is known as "good-time", the base award available to all

general population prisoners at a maximum 15 percent of the imposed sentence; the jail will deduct any misconduct from that credit. Comparable to the DOC's earned time, the jails' policies permit prisoners to receive additional credit through work programs to achieve a maximum earned early release credit of 30 percent of the imposed sentence at Clark County Jail and 20 percent or 30 percent at Pierce County Jail. Both Fogle and MacFarlane received the maximum 15 percent credit as general population prisoners.

Defendants filed separate personal restraint petitions in the Court of Appeals attacking the county jails' earned early release policies. Denying an equal protection challenge, the Court of Appeals granted Fogle's petition in part on the basis that the Pierce County Jail inaccurately calculated his credit and ordered readjustment to 17 days. This court granted Fogle direct discretionary review and certified MacFarlanes' petition, consolidating the cases on review.

Defendants focus on two features of the county jail polices: the denial of the full statutory maximum and the exclusion of most prisoners from the higher credit work programs. Defendants claim the county jails have exceeded their statutory authority by formulating these policies. At the heart of this case, Defendants raise an equal protection challenge against the disparate treatment of presentence detainees. In addition, Defendants claim the policies violate double jeopardy and due process.

I. Statutory Authority for Earned Early Release Credit

Defendants argue RCW 9.94A.150(1) mandates all earned early release credit programs allow every prisoner, except those explicitly excluded as violent or sex offenders, to earn the full statutory maximum credit. Defendants' argument runs contrary to this court's decision in In re Williams, supra, and the Legislature's intent for independent, plenary county jail authority over earned early release policies. See Williams, 121 Wn.2d at 666.

As here, Williams considered an equal protection challenge to a county jail's certification of less than the statutory maximum for a presentence detainee. Without reaching the equal protection issue, Williams rested on the issue of statutory authority to hold prisoners do not have "a right . . . to challenge their [jail] certifications merely because they were not awarded the statutorily permitted maximum amount of good time." Williams, 121 Wn.2d at 666. Nor does the statute create a right to a specific method of calculation.

We also reject Defendants' interpretation of RCW 9.94A.150(1) as requiring that jails permit all prisoners access to work programs. The clause describing "good behavior and good performance" merely indicates the factors for awarding credit within the provision's overall grant of authority to facilities to create independent policies. Williams, 121 Wn.2d 661. We hold the Clark and Pierce County Jails' policies are consistent with the grant of authority in RCW 9.94A.50(1).

II. Equal Protection Analysis

"Equal protection requires that persons similarly situated receive like treatment." Mota, 114 Wn.2d at 473. Defendants assert the Clark and Pierce County Jails' earned early release policies violate prisoners' equal protection rights under the state and federal constitutions by awarding most prisoners, particularly presentence detainees, only 15 percent credit. Defendants claim the jails' policies result in longer sentences for presentence detainees than for prisoners spending their entire sentences in a DOC facility.

1. Level of Scrutiny

Equal protection analysis generally applies the rational basis test: whether the policy is rationally related to a legitimate state purpose. Mota, 114 Wn.2d at 475. In Mota, however, this court utilized intermediate scrutiny, holding the state failed to assert a substantial interest in denying presentence detainees any earned early release credit. Mota, 114 Wn.2d at 473. Defendants urge the court to adopt an

intermediate scrutiny standard here.

Intermediate scrutiny is appropriate only where the denial of a liberty interest is due to a semi-suspect classification. Mota, 114 Wn.2d at 474. The Mota court reasoned the DOC's failure to award good-time credit under the former RCW 9.94A.150(1) to a presentence detainee financially unable to post bail represented discrimination on the basis of wealth. Mota, 114 Wn.2d at 474. Following Mota, the Court of Appeals has applied rational basis to an equal protection challenge to disparate earned early release policies where the presentence detainee was held without bail: indigency did not serve as the basis for the disparate treatment. Cromeenes, 72 Wn. App. at 357.

Without disturbing Mota, we note failure to pay set bail does not necessarily represent a wealth-based classification to merit semi-suspect status. The determination of bail may depend on may factors beyond wealth, such as perceived dangerousness and likelihood of flight. See CrR 3.2(b). Moreover, a prisoner may elect not to pay bail for reasons other than financial condition.

In the present case there is some dispute whether Defendants were eligible for bail. In addition, both Defendants were held on separate fugitive warrants, likely to render payment of bail on the primary charge futile. Nonetheless, we will construe the facts in the light most favorable to Defendants and proceed on an intermediate scrutiny standard.

2. Intermediate Scrutiny Analysis

Defendants claim no substantial, or even legitimate state interest is served by the county jails' tiered credit policies awarding only 15 percent credit to most prisoners. Although 30 percent credit is available to county jail prisoners, Defendants submit most inmates, especially presentence detainees, do not achieve work program status. Applying intermediate scrutiny, we hold the state's substantial interest in maintaining prisoner discipline, particularly by preventing

flight from prosecution and preserving local control over jails, justifies disparate treatment to overcome Defendants' equal protection challenge.

We first remark, contrary to Defendants' position, the result of the 15 percent award for general population prisoners does not result in longer sentences for presentence detainees. Earned early release credit has no effect on sentencing. The lower award does result in more days served. Had Defendants served their presentence days in a DOC facility they could have potentially earned more credit and ultimately a larger sentence reduction. On good-conduct time alone, Fogle would have been eligible for 34 days, MacFarlane for 48 days. With earned time Fogle might have reached 51 days and MacFarlane 72 days.

Discipline and punishment are the primary purposes of the sentencing statute. Williams, 121 Wn.2d at 662; Mota, 114 Wn.2d at 475-77. Limiting access to work programs serves the substantial purposes of punishment and discipline by basing eligibility on the severity of the crime and the prisoner's behavior. See Williams, 121 Wn.2d at 662. In regard to program participation, presentence detainees are not similarly situated to convicted prisoners in county jail or a DOC facility: the risk of flight from prosecution makes presentence detainees particularly unsuitable for work program assignment. Cromeenes, 72 Wn. App. at 358. As we explained in Williams:

> [T]he very fact of bail and presentence incarceration raises the possibility of disparate treatment based upon wealth. In general, however, the needs of the justice system in assuring the presence of defendants at trial are deemed sufficient to validate such a system.. . .

(Citations omitted.) Williams, 121 Wn.2d at 665. The tiered systems also advances discipline by providing an incentive for county inmates to improve behavior and earn work program

participation. Cromeenes, 72 Wn. App. at 357.

The Legislature authorized independent county jail credit policies in RCW 9.94A.150 in recognition that the statute's disciplinary purpose was better promoted through local control. As this court emphasized in Williams:

> If a correctional institution is to be able to effectively administer its good-time policies in order to further prison discipline, it must actually have control over the award or denial of good time for offenders under its jurisdiction. Good time would be useless in controlling prison discipline in county jails if offenders knew they would be automatically credited with full good time upon their transfer to the Department. . . .

Williams, 121 Wn.2d at 662. The county jails are uniquely situated to determine the best means to control their prisoner populations, particularly presentence detainees presenting special disciplinary concerns not faced by DOC facilities.

III. Double Jeopardy

Defendants maintain the jails' denial of earned early release credit equal to that available from the DOC imposes multiple punishment to violate the prohibition against double jeopardy. As this court noted in State v. Phelan, supra, double jeopardy demands full credit for presentence jail time as well as earned early release time actually earned. Phelan, 100 Wn.2d at 515. At the same time, double jeopardy does not mandate earned early release credit for speculative time the prisoner might have earned under a different credit program. Phelan, 100 Wn.2d at 516. Reaffirming the Phelan analysis, we hold the disparate earned early release policies here do not result in multiple punishment to trigger double jeopardy protection. See Phelan, 100 Wn.2d at 516.

IV. Due Process

Defendants contend the jails violated due process by failing to establish procedures for presentence detainees to earn the statutory maximum earned early release credit. This court has recognized the statutory right to earned early release credit creates a limited liberty interest requiring minimal due process. In re Anderson, 112 Wn.2d 546, 548, 772 P.2d 510 (1989). However, where due process concerns are implicated in an equal protection challenge, the court will generally rest its decision on an equal protection analysis. Mota, 114 Wn.2d at 474 n.1. Regardless, the jails here established and observed their written earned early release policy consistent with due process requirements.

/s/ Dolliver, J.

WE CONCUR:

/s/ Durham, CJ

/s/ Smith, J.

/s/ Guy, J.

/s/ Talmadge, J.

In re Fogle

In re MacFarlane

Majority by Dolliver, J.

Dissent by Alexander, J.

No. 62191-8

ALEXANDER, J. (dissenting) -- I dissent because I believe that the equal protection clause of the Fourteenth Amendment to the United States Constitution is offended by a system that awards less of the good behavior component of earned early release credit to an offender who is held in jail pending trial and sentencing on a noncapital felony than it awards to a similarly situated offender who serves his or her entire sentence in a Department of Corrections (DOC) facility.

As the majority points out, this court in *In re Mota*, 114 Wn.2d 465, 788 P.2d 538 (1990), concluded that the Constitution was violated by a system that completely denied earned early release credit to offenders who awaited trial and sentencing in a county jail, because such a system treated those offenders "differently from those who serve[d] the entire sentence either in county jail or in a state institution." *Mota*, 114 Wn.2d at 473. Consistent with *Mota*, the Legislature amended the statute relating to earned early release credits and required that any such program "shall allow an offender to earn early release credits for presentence incarceration." RCW 9.92.151(1) (as amended by Laws of 1990 ch. 3, § 201). The amendment cured the problem identified in *Mota* because it mandated that the early release policies of local correctional facilities, including county jails, must apply to persons who spend time in a county jail pending trial and sentencing. The amendment did not, however, resolve the equal protection challenge that is presented by this case.

Although the majority somewhat grudgingly concedes that the equal protection challenge presented by this case is wealth based, it appears to suggest that there is some question whether these Petitioners spent time in a county jail because of their financial inability to post bail. I recognize that the record we have furnished is not particularly clear as to whether either Fogle or MacFarlane was detained in jail prior to trial and sentencing because of a financial inability to post bail, or for some other reason. The majority indicates that there was "some dispute whether Defendants were eligible for bail," noting that "both [Fogle and MacFarlane] were held on separate fugitive warrants" pending trial. (Majority Op. at 8.) Whether, as the majority suggests, the existence of such warrants was "likely to render payment of bail on the primary charge futile," however, is a matter of conjecture. (Majority Op. at 8.) In the absence of evidence to the contrary, it is reasonable to assume that these two trial courts would have had to set bail in some amount or would have had to impose some combination of conditions other than detention in order to assure these Defendants' appearance at trial. *See* CrR 3.2(a) ("The court shall impose the least restrictive . . . conditions that will reasonably assure that the accused will be present for later hearings . . . ."). Significantly, there is nothing in the record to indicate that any court had denied bail to either Fogle or MacFarlane. On the contrary, the record contains a teletype warrant, perhaps one of the fugitive warrants referenced by the majority, indicating that, with respect to a charge against MacFarlane in Pierce County Superior Court, "cash or surety bond [is] to be approved by court." (Mot. to Supplement the R. at Ex. A.)

Insofar as the Petitioners' ability to post bail is concerned, both assert that they were financially unable to do so. In his Motion for Discretionary Review, Fogle contends that he was detained in jail pending trial "solely on [the] basis of his financial ability to post bail." (Mot. for Discretionary Review at 2.) Similarly, in a Reply Brief filed with the Court of Appeals, Division Two, MacFarlane, who appeared without

benefit of counsel, summarized his position as follows:

> After all is said and done, the discrimination in the present case is fueled by a perverse reading of the statute leveled against those too poor to raise bail and unable to obtain release on personal recognizance - - that is the real rub in Mr. MacFarlane[']s case.

(Reply to Prosecutor's Resp. at 13.) In short, the State has not demonstrated that the Petitioners' failure to post bail was for reasons other than financial inability. I am satisfied, therefore, that the Petitioners have properly raised an important equal protection question: Were they treated differently from other similarly situated offenders simply because of their indigency?

Putting aside for the moment any speculation about the reason for Fogle's and MacFarlane's inability to post bail, it is certain that because bail was not posted, these Petitioners each became subject to the earned early release credit policies of the county for the time spent in county jail pending trial and sentencing.[12] Pursuant to those policies, the counties certified to DOC, and DOC awarded Fogle and MacFarlane good conduct time credit equal to fifteen percent of the time they each served in a county jail, the maximum credit for good

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[12] Fogle was detained in the Pierce County Jail for 102 days pending trial and sentencing on ten counts of possession of a controlled substance. Fogle ultimately pled guilty to one count, and was sentenced to sixty months in prison, to be served concurrently with a separate probation revocation. MacFarlane was held in the Clark County Jail for 144 days pending trial and sentencing on charges of possession of a controlled substance and assault in the third degree. MacFarlane ultimately pled guilty to both charges and received an exceptional sentence of seventy-two months for the possession offense, and eight months for the assault, to be served concurrently.

behavior permitted under the counties' policies.[13] Importantly, as the majority concedes, had Fogle and MacFarlane not served their presentence time in a county jail, each would have been eligible to receive more credit for good behavior against his sentence than was actually received. In addition, under the policies of each of the two counties, the Petitioners were ineligible to participate in any program that would allow them to accumulate "earned time" for good *performance* during that time. Consequently, they did not receive any earned early release credit for good performance while awaiting trial and sentencing. In sum, the application of these policies in Fogle's and MacFarlane's cases resulted in the Petitioners receiving less total earned early release credits against their sentences than they would have received had they served their entire sentence in a state correctional facility.[14]

By this dissent, I do not mean to suggest that a county violates the equal protection provisions of the United States Constitution when it withholds good conduct credit from offenders who have not exhibited good behavior while detained in jail. Indeed, county correctional facility managers must have the ultimate discretion to determine whether an inmate has exhibited good behavior and/or good performance. Furthermore, I concur with the majority, insofar as it concludes

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[13] Under DOC policy, an inmate may receive up to ten days' credit for each thirty days served for good behavior.

[14] As the majority observes, a prisoner in a state facility is eligible to earn not only "good-conduct time" for good behavior at a rate of ten days per thirty days served, but also may accumulate "earned time" for good performance while participating in work, academic or treatment programs. The combination of "good-conduct time" and "earned time" may not exceed a statutory maximum of one-third of the imposed sentence. (Majority Op. at 3.) *See* RCW 9.94A.150(1).

that the policies of the counties that restrict eligibility for the good performance component of earned early release time credit for participation in work release or academic programs survive an equal protection challenge. My disagreement with the majority relates only to the manner in which good behavior credit was applied to the sentences imposed by the trial court on Fogle and MacFarlane, two offenders who were determined by county jail officials to have exhibited good behavior while they were detained in jail pending trial and sentencing. In my judgment, the manner in which credit for good behavior was applied by the DOC and Clark and Pierce counties implicates the equal protection clause of the federal Constitution because the counties and state had no legitimate reason, such as a lack of good conduct on the part of the Petitioners, to award Fogle and MacFarlane less good time credit than they would have been awarded had they served their entire sentences in a DOC facility.

Respondent Clark County asserts that the Petitioners' claim that the county policies are unconstitutional is misplaced because "[t]hough Clark County awards fifteen percent (15%) good time credit [for good behavior], the Department of Corrections can award the defendant a higher percentage so that the aggregate sentence of good time is equal to [the statutory maximum] one-third." (Resp't br. at 6) (citing RCW 9.94A.150). I recognize that the Petitioners generally focus their claims on the policies of the counties. However, because these Petitioners did not have their good behavior credit reduced for misconduct, their complaints with respect to crediting of their good behavior time necessarily relate to the flaws in the entire system of awarding, certifying, and crediting time against the sentences of offenders who are detained in a

county facility prior to serving a sentence in a state correctional facility. Whether it is the county or the state that erroneously awards, certifies, or credits time for good behavior is of little moment to an offender whose legitimate liberty interest, protected by the equal protection clause of the United States Constitution, is violated by this system.

As the majority observes, the equal protection clause of the United States Constitution requires the government to treat persons who are similarly situated in a like manner. *See* U.S. Const. amend. XIV, § 1. The majority also recognizes that because the central issue in the case concerns an alleged denial of a liberty interest based on wealth, a semi-suspect classification, the appropriate standard of review of the policies of the counties is intermediate scrutiny. (Majority Op. at 7-8.) The test under this level of scrutiny is whether the disparate treatment "may fairly be viewed as furthering a substantial interest of the State." *Plyler v. Doe*, 457 U.S. 202, 217-18, 102 S. Ct. 2382, 72 L. Ed. 2d 786, *reh'g denied*, 458 U.S. 1131 (1992) (footnote omitted).

The class of persons subjected to disparate treatment in this case is persons who are sentenced to state correctional facilities for noncapital felonies.[15] While all members of this class who are not released from jail on their personal recognizance pending trial have the right to obtain their release by posting bail,[16] some members of that class have sufficient funds to post bail and others do not. The portion of the class that is unable to post bail is, as we have already observed,

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[15] The class is not, as the majority seems to suggest, all persons incarcerated in a county jail.
[16] Washington Const. art. I, § 20; CrR 3.2. *See also State v. Kelly*, 60 Wn. App. 921, 926-27, 808 P.2d 1150 (1991).

subject to the earned early release credit policies of the county. Those members of the class that obtain release on bail, but who are later convicted and sentenced to prison, are subject to the more generous policies of DOC regarding good behavior credit, and thus become eligible to accumulate more earned early release credit for good behavior. Ultimately, the latter group of individuals serve less of their sentences than those who were not able to post bail. The result is that the less wealthy members of the class fare worse than their more well-heeled classmates.

The majority suggests that a person's failure to post bail may not always be driven by financial reasons. While in a theoretical sense that may be true, in a practical sense it is still a fact of life that most persons charged with a crime who have the wherewithal to post bail will do so. In this case, moreover, the Petitioners said that they would have posted bail had they been able to do so.

The majority also holds that "the state's substantial interest in maintaining prisoner discipline, particularly by preventing flight from prosecution and preserving local control over jails, justifies disparate treatment to overcome [the Petitioners'] equal protection challenge" even under a intermediate scrutiny analysis. (Majority Op. at 8.) I fail to see how awarding a person who makes bail a more generous earned release credit than one who does not has any effect on jail discipline. That conclusion seems obvious because the individuals who post bail and obtain their release from jail are not subject to jail discipline. Furthermore, of those offenders who are unable to post bail, only those who maintain good behavior, thus becoming eligible for the maximum amount of the good behavior component of earned early release credit, are

penalized by the counties certification of good behavior credit and the application of those credits by DOC. While it is clear that this unequal treatment does punish those who are unable to make bail, it hardly seems that it is a substantial or legitimate purpose of pretrial detention to exact punishment of the indigent.

In the case of *In re Williams*, this court said that "significant equal protection concerns are raised by the differential treatment that may be accorded the indigent as a result of his inability to post bail before trial." *In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993) (citing *Mota*, 114 Wn.2d at 469-70). While we do not have precisely the same issue before us as we had in *Williams* and *Mota*, this is still a case that involves the equal protection concerns we recognized in *Williams*. In *Williams*, the DOC asserted that it had merely a passive role in applying the certificates of time served and credits earned as calculated by the county jails for offenders transferred from the jails to state correctional facilities. Recognizing that such a position could raise "important equal protection problems," we held that although the DOC is "entitled to give presumptive legal effect to the certification the county jail provides," the certificate had no "legal force if it is based upon an apparent or manifest error of law." *Williams*, 121 Wn.2d at 664 (footnote omitted).

The foundation of the system that we have examined here, which accords some persons unfavorable treatment simply because they are financially unable to post bail, is unconstitutional. It is, therefore, based on a manifest error of law. This being the case, DOC cannot assume the passive role of blindly accepting the certificate of earned early release time indicating the amount of good behavior credit that was

calculated by the counties. In light of the above, that portion of the certificate essentially can have no legal force other than to inform DOC that Fogle and MacFarlane are eligible for the maximum credit for good behavior allowable under DOC policies for the period of time the Petitioners served awaiting trial and sentencing. I would, therefore, have us hold that DOC must (a) disregard the credit for good behavior calculated and certified by the counties in this case, (b) calculate the amount

of credit for good behavior that the Petitioners would have received had they been subject to DOC earned early release time policies regarding good behavior for that period of time, and (c) credit that amount of time against the Petitioners' time served.

/s/ Alexander, J.

I concur Madsen, J.

I concur Johnson, J.

I concur Pekelis, J.

DEPARTMENT OF CORRECTIONS **POLICY**

POLICY NUMBER

350.130

TITLE

SENTENCE REDUCTION COMPUTATION

EFFECTIVE DATE: August 15, 1990

AUTHORITY:

General authority of the Secretary of Corrections to manage and direct the Department, RCW 72.09.050, and Chapter 9.94A RCW.

PURPOSE:

To establish a means, consistent with DOC 350.100, Earned Release Time, for staff to compute Earned Release Time earned by offenders committed to the Department of Corrections.

APPLICABILITY:

The Divisions of Community Corrections, Prisons, and Offender Programs.

DEFINITIONS:

1. Good Conduct Time: That portion of time which an offender is eligible to earn by behaving pro-socially, i.e. not receiving serious infractions as listed in WAC 137-28-030 and WAC 137-56. Offenders convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, may

earn a sentence reduction of up to 3.65 days per 30 day period served. All other offenders may earn a sentence reduction of up to 10 days per 30 day period served.

2. Earned Time: That portion of time an offender is eligible to earn for program participation consistent with his/her case management plan. Offenders convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, may earn a sentence reduction of up to 1.77 days per 30 day period served or a total of 22.0 days in a 365 day period. All other offenders may earn a sentence reduction of up to 5 days per 30 day period served or a total of 61 days in a 365 day period.

3. Earned Release Time: The combined earned time and good conduct time credit an offender is eligible to earn off the minimum term established by the Indeterminate Sentence Review Board or the sentencing court. In no case shall earned release time exceed 15% of the sentence for offenders convicted of a serious violent offense or a sex offense as defined in 9.94A.030 RCW that is a class A felony committed on or after July 1, 1990. In no other case may the aggregate earned release time exceed one third of the total sentence. The reduction is authorized by the 1990 amendments to Section 1, Chapter 248, Laws of 1989 and RCW 9.92.151. Consistent with RCW 72.09.130, the Department will inform each offender in writing once a year, as to his/her conduct and performance.

4. Failure to Earn: Earned release time shall be

earned. Good conduct time shall be subject to appropriate disciplinary action and shall not be granted for serious infractions as established under the disciplinary regulations (WAC 137-28-030 and WAC 137.56). If earned time is not granted, it will be in accordance with WAC 137-28-032.

5. Review Period: The yearly review of earned release time for the purpose of validation of those credits. Yearly reviews are scheduled annually from the time start of the sentence.

6. Validation: A review of good conduct time and earned time by the Superintendent/Supervisor/Chief of Classification & Treatment confirming that the recorded earned release time is an accurate reflection of what an offender is eligible to earn at that time based upon the offender's behavior, performance and overall record. Validation will be done no less than yearly, at the point of facility transfer, and at the request of the Indeterminate Sentence Review Board.

7. Certification: The granting of good conduct time and earned time to Sentencing Reform Act offenders by the Facility Administrator. The amount of time certified by the Facility Administrator cannot exceed the limits identified under #3. Earned Release Time, in the Definition section of this policy. Certification is done at the transfer of time start and the end of the controlling sentence. For indeterminate sentenced offenders, certification is not final until adoption by the Indeterminate Sentence Review Board.

8. Adoption: The process by which the Indeterminate Sentence Review Board grants earned release time which has been certified by the Facility Administrator for indeterminate sentenced offenders.

9. Programming: Offender participation in activities approved by the classification process and consistent with the case management plan.If a program is available in more than one facility, credit for the program must by approved by the Director, Division of Offender Programs. Program activities include, but are not limited to:

A. Work

B. School (academic or vocational)

C. Admissions testing/orientation at the Reception Centers

D. Involvement in programs such as Alcoholics Anonymous, Narcotics Anonymous, Anger Management, and Substance Abuse Treatment

E. Volunteer programs as approved by the facility administrator.

F. Programming developed for offenders who, through no fault of their own, are unable to work or attend school due to medical/mental health reasons or those who are on a waiting list pending program involvement consistent with their case management plan

G. Offenders on protective custody status who are willing to perform available work/program assignments

H. Offenders in transit who are eligible to earn earned time upon arrival at their new facility

I. Offenders removed from the institution for court orders will receive or be denied earned time credit consistent with their status immediately prior to leaving their assigned facility. However, if the offender can demonstrate that he/she was assigned to programming consistent with this policy while in jail, earned time will be granted.

J. With the exception of those on Community Custody status, offender participation in pre-release and work release programs.

10. Facility Administrator: The Superintendent of an institution, camp, or pre-release facility, the Supervisor of a work release facility, and the Chief of Classification & Treatment in the Department of Corrections, Division of Offender Programs, or his/her designee.

POLICY:

1. Good Conduct Time: An offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, is eligible to earn up to 3.65 days good conduct time on that offense per 30-day period served. All other offenses for these offenders are eligible to earn up to 10 days good conduct time per 30-day period served. All other offenders are eligible to earn up to 10 days good

conduct time per 30 day period served. Offenders will fail to earn good conduct time if they receive serious infractions under the Disciplinary Policy (WAC 137-28-030 and WAC 137-56).

A. Sentence Reduction–A sentence reduction for good conduct time shall be established for each offender and computed on a pro-rata basis of 3.65 days or 10 days per 30 day period as indicated for the crime categories as listed in #1 above.

All offenders sentenced for crimes committed after July 1, 1984, shall be eligible for good conduct time, with the exception of those committed for Rape First Degree, or under the death penalty, and/or life without the possibility of parole. Offenders under sentence for Rape First Degree shall not reduce a term of confinement to less than three years actual time served. Good conduct time shall be applicable to all Class A, B, and C felonies, with the exceptions noted.

Indeterminate offenders may not earn good conduct time if their minimum term has expired and they have not been paroled or transferred to a consecutive sentence. Offenders who are serving time as a result of lost earned time or lose good conduct time may not earn good conduct time.

Indeterminate offenders whose time has not been adopted by the Indeterminate Sentence Review Board, and determinate offenders whose time has not been

certified and who are serving time as a result of lost earned time or lost good conduct time, may lost their uncertified or invalidated good conduct time.

B. Failure to Earn--Good conduct time not earned as a result of disciplinary action for serious infractions will not be certified by the Facility Administrator. This includes available good conduct time for offenders who are serving time as a result of lost good conduct time. Time not earned shall be consistent with the presumptive sanctions established by DOC Policy #320.100. Such adjustments will be reflected at the rate established by the Disciplinary Hearing Officer/Committee, subject to the Superintendent's/Supervisor's/Chief of Classification & Treatment's approval at validation or certification.

Good conduct time conditionally lost through disciplinary action at the current institution/facility of assignment can be restored by the Facility Administrator under whom the disciplinary action occurred, provided that the Indeterminate Sentence Review Board has not adopted the good conduct time on an indeterminate sentence, or a Superintendent/Supervisor/Chief of Classification & Treatment has not certified the time on a determinate sentence.

In lieu of receiving additional disciplinary action by the Indeterminate Sentence Review Board, an offender may not be

granted additional good conduct time which has not been adopted by the Indeterminate Sentence Review Board or certified by the Facility Administrator.

Once an offender has had a valid transfer of time start from one cause to another cause, the good conduct time associated with the previous cause is no longer subject to not being certified.

2. Earned Time: In addition to good conduct time, offenders who participate in approved programs to assist in their return to the community and which are consistent with their case management plan are eligible to earn Earned Time. Offenders convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, are eligible to earn 22.0 days per year. All other offenders are eligible to earn 61 days per year. Offenders may be required to complete certain programming to meet institutional needs.

A. Criteria for Earning--Earning the 22.0 or 61 days as indicated for the crime categories as listed on #2 above will be contingent upon the offender programming, i.e., participating in his/her case management plan, and not refusing any program assignments or being fired/terminated from work or any assigned program.

If an offender satisfies the above criteria, he/she is eligible to earn the maximum amount of earned time, i.e. 1.77 or 5 days earned time for each 30 days or a maximum of 22.0 or 61 days per year

depending on the limits identified in #2, Earned Time, in the Definition section of this policy.

B. Failure to Earn--Offenders will fail to earn earned time if:

1. They are not involved in programming consistent with their case management plan.

2. They refuse a work assignment. Each refusal of a work assignment from a waiting list will result in the offender receiving an infraction #557 or #857 (Refusal to Work) and 1.77 or 5 days earned time not being validated/certified for that calendar month consistent with #2. Earned Time, in the Definition section of this policy, and, if applicable, for each calendar month the offender has received credits while on the waiting list.

3. They are fired or terminated from a job or program for their own negative or sub-standard performance. Each such termination will result in 1.77 or 5 days earned time not being validated/certified for that calendar month consistent with #2, Earned Time, in the Definition section of this policy. Such loss will be subject to review for appropriateness by a classification action.

4. They refuse to go to camp or pre-release. Each such refusal will be considered the same as a refusal to work and will result in the offender receiving an infraction #557 or #857 (Refusal to Work). Additionally, 1.77 or 5 days earned time will not be granted for each calendar month the offender refuses assignment consistent with #2. Earned Time, in the Definition section of this policy. Exceptions to facility assignment will be made on a case-by-case basis by the classification committee consistent with the offender's case plan.

5. They are placed in Administrative or Disciplinary Segregation for 20 days or more in one calendar month. Such placement will result in the offender's failure to earn earned time for that month consistent with #2, Earned Time, in the Definition section of this policy unless the Placement in Administrative Segregation is for protective custody concerns. If the time served in segregation is longer than 30 days, 1.77 or 5 days will not be earned for each calendar month in which 20 or more days are spent in segregation. The offender is not eligible to begin earning earned time until he/she returns to general population and begins programming.

Earned time must be certified in order to be considered as earned time, consistent with WAC 137-28-032 and WAC 137-56.

Non-validation/non-certification of earned time will be consistent with WAC 137-28 and will be addressed at the yearly review period, time of facility transfer, transfer to a consecutive sentence or at the request of the Indeterminate Sentence Review Board. Prior to the non-

validation/non-certification of earned time, the basis for the proposed non-validation/non-certification shall be explained to the offender. Should the offender wish to contest the proposed non-validation/non-certification, he/she may request a hearing. Provided the offender has requested a hearing, he/she will be given written notice of the hearing and the basis for the proposed denial. Unless waived by the offender, the hearing will be held at least 24 hours otherwise, appeals will be heard at the location where earned time is not being granted prior to an offender's transfer elsewhere. If the offender has been transferred to another facility, the requested hearing may be held at the offender's current location. The offender may appeal the recommendation of the hearing officer to the Facility Administrator of the facility where the hearing is held. Appeals must be submitted in writing within 24 hours of the conclusion of the hearing. Action taken by the Facility Administrator is final.

Consistent with #2, Earned Time, in the Definition section of this policy, the maximum amount of time that the offender can fail to earn is 1.77 or 5 days in one calendar month regardless of the number of reasons for non-validation/non-certification of earned time in that month. Once lost, earned time cannot be re-earned.

3. Recording/Validation/Certification:

All yearly reviews conducted on or after August 15, 1990 will be in accordance with this policy.

A. Earned time eligible to be earned will be recorded on a monthly basis.

B. Earned time and good conduct time will be reviewed and validated by the Facility Administrator at intervals not to exceed 1 year, at the time of facility transfer, or when requested by the Indeterminate Sentence Review Board. At the time of their yearly review, each offender will

receive a written record of the Earned Release Time they are eligible to earn.

C. Earned release time will be certified by the Facility Administrator at the end of the longest concurrent sentence, or where consecutive sentences are present, at the transfer of a valid time start.

D. Prior to adoption by the Indeterminate Sentence Review Board for indeterminate sentences or certification by Facility Administrator for determinate sentences, the earned release date may be projected for classification purposes when considering minimum facility placement, pre-release, work release, and pre-parole planning.

E. The Division of Offender Programs will be responsible for validation and certification of earned release time for offenders housed out of state.

4. Community Custody: Such offenders may be certified by the Facility Administrator as eligible for transfer to Community Custody status in lieu of earned release time provided the earned release time has been certified to that point. Pursuant to RCW 9.94A.150, the following offenders may not have their sentences reduced by earned release time.

A. Persons convicted of a sex crime.

B. Persons convicted of an offense statutorily categorized as a serious violent offense.

C. Persons convicted of Assault in the Second Degree.

D. Persons convicted of any crime against a person where it is determined in accordance with RCW 9.94A.125, "that the defendant or an accomplice was armed with a deadly weapon at the time of commission."

E. Persons convicted of any felony offenses under chapter 69.50 RCW or chapter 69.52 RCW.

The transfer to Community Custody status may occur at the same time that the offender would normally be eligible for earned release under this earned time policy.

As offenders serving Community Custody status have already had their earned release time certified, they will not earn additional good conduct time or earned time if returned to total or partial confinement.

5. Exceptions to this procedure may be granted by the Director, Division of Offender Programs.

REFERENCES:

RCW 72.09.130; RCW 9.95; RCW 9.94A.120, RCW 9.94A.140; RCW 9.94A.125; RCW 9.94A.150; RCW 9.94A.030; RCW 9.92.151; RCW 72.09.050; Chapter 69.50 RCW; Chapter 69.52 RCW; WAC 137-28; WAC 137-56;
Policy Directive 320.100; Serious Infraction--Presumptive Sanctions.

SUPERSESSION:

Policy Directive 350.100; Earned Early Release Incentives, March 1, 1986.

/s/ Chase Riveland
Chase Riveland, Secretary July 30, 1990

CLARK COUNTY SHERIFF'S
DEPARTMENT

Don MacFarlane

FROM Clark County Jail Records

DATE 4/14/94

SUBJECT Good time calculations

Under #05.160.100 Outdate Calculations of our policy and procedures, section C states the following:

C. Good time-

Days are calculated with a Good time Credit for all eligible inmates. The 15% Good time Credit will be applied to the total sentence after the seventh day of the current incarceration.

GARY LUCAS
Clark County Sheriff
By /s/ K. Woods
Clerk or Deputy

PIERCE COUNTY SHERIFF'S DEPARTMENT
Corrections Bureau

February 25, 1992

MEMORANDUM NO. 92-23

SUBJECT: PRISONER GOOD BEHAVIOR RELEASE CREDIT
Re: Revision of Credit Schedule

Effective March 1, 1992, the Good Behavior Release Credits for all prisoners sentenced after February 29, 1992, will be computed as follows:

Prisoners sentenced for the following offenses will receive a maximum fifteen percent (15%) GBR credit regardless of their assignment/duties:

Rape 1
Statutory Rape 1
Child Rape 1
Child Molestation 1
Kidnap 1
Aggravated Murder 1
Murder 1
Murder 2
Assault 1
Robbery 1
Homicide By Abuse

General Population Prisoners and Work Release Prisoners will receive fifteen percent (15%) GBR credit.

Prisoner Unit Workers will receive twenty percent (20%) GBR credit.

Prison Workers will receive thirty percent (30) GBR Credit.

Prisoners sentenced prior to March 1, 1992, will receive GBR credits consistent with Memorandum 91-38. Dated June 4, 1991. Exception: Prisoners sentenced for offenses mentioned in subparagraph 1 will have their GBR dates adjusted, if necessary, to ensure that the maximum credit allowed does not exceed fifteen percent (15%) regardless of assignment/duties.

GENE TESS
Captain
Operations Division Commander
Distribution: C

Wash. Rev. Code § 9.94A.150

Leaving correctional facility or release before expiration of sentence prohibited—Exceptions.

No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows:

(1) Except as otherwise provided for in subsection (2) of this section, the term of the sentence of an offender committed to a correctional facility operated by the department, may be reduced by earned early release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined. The earned early release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned early release credits in advance of the offender actually earning the credits. Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration. If an offender is transferred from a county jail to the department of corrections, the county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned early release time. In the case of an offender who has been convicted of a felony committed after July 23, 1995, that involves any applicable deadly weapon enhancements under RCW 9.94A.310 (3) or (4), or both, shall not receive any good time credits or earned early release time for that portion of his or her sentence that results from any deadly weapon enhancements. In the case of an offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, the aggregate earned early release time may not exceed fifteen percent of the sentence. In no other case shall the aggregate earned early release time exceed one-third of the total sentence;

Wash. Rev. Code § 9.92.151
Early release for good behavior.

The sentence of a prisoner confined in a county jail facility for a felony, gross misdemeanor, or misdemeanor conviction may be reduced by earned release credits in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction. The earned early release time shall be for good behavior and good performance as determined by the correctional agency having jurisdiction. Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration. The correctional agency shall not credit the offender with earned early release credits in advance of the offender actually earning the credits. In the case of an offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, the aggregate earned early release time may not exceed fifteen percent of the sentence. In no other case may the aggregate earned early release time exceed one-third of the total sentence. [1990 c 3 § 201; 1989 c 248 § 1.]

(2)

No. 99-437

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DEC 13 1999
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOSEPH LEHMAN, Secretary,
Washington State Department of Corrections,

Petitioner,

v.

DONALD MACFARLANE and JAMES FOGLE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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December 13, 1999

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CASE HISTORY

Washington State prisoner Donald MacFarlane was convicted of unlawful possession of a controlled substance with intent to deliver and on June 24, 1991 he was sentenced by the Clark County Superior Court to serve 72 months in confinement. Washington State prisoner James Fogle was convicted of possession of a controlled substance, and in 1992 he was sentenced by the Pierce County Superior Court to serve 60 months in confinement. They were both unable to afford to post bail and were therefore detained in the respective county jails prior to sentencing. MacFarlane spent 144 presentence days in the Clark County Jail, and Fogle spent 102 presentence days in the Pierce County Jail. Due to the local jail policies of the Pierce and Clark County Jails, they received less earned early release credit for the time they spent in those county jails than they would have received had they been released on bail and later had to serve the exact same amount of time in a state correctional facility, or in other county jails in Washington State. *See, e.g., In re Williams*, 121 Wn.2d 655, 658, 853 P.2d 444 (1993).[1] "Early

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[1] State prisoners in the custody of the Department of Corrections are eligible to earn up to a one-third sentence reduction. The reported facts of *Williams* show that the administration of the King County Jail, located in Seattle, allows pretrial detainees to earn up to one-third time off for good conduct. At the time respondents were in Pierce and Clark County jails, local policy provided that no prisoner charged with or convicted of a felony was eligible to earn as much as a one-third sentence reduction.

While this case was pending in the District Court, Pierce County changed its policy so that now all pretrial detainees in the Pierce County Jail are eligible to earn as much good time

release" credit is made up of two components, "good conduct" and "good performance." "Good conduct" credit is awarded for the absence of misconduct. "Good performance" credit is awarded for affirmative participation in various work or rehabilitative programs. *MacFarlane v. Walter*, 179 F.3d 1131, 1135 n.1 (9th Cir. 1999).

MacFarlane and Fogle filed separate personal restraint petitions in the Washington Court of Appeals, challenging the county jails' early-release policies as violative of equal protection. The Washington Court of Appeals rejected Fogle's petition, and the Washington Supreme Court then granted Fogle's petition for discretionary review. The state supreme court also transferred MacFarlane's personal restraint petition, which was then pending in the Washington Court of Appeals, to the state supreme court, and consolidated the two cases for review. On November 2, 1995 the Washington Supreme Court, in a 5-to-4 decision, rejected the prisoners' equal protection claims. *In re Fogle*, 128 Wn.2d 56, 904 P.2d 722 (1995).

In August of 1996, MacFarlane and Fogle filed habeas corpus petitions in the United States District Court for the Western District of Washington. Their petitions were consolidated. The Magistrate Judge issued a Report & Recommendation recommending that their petitions be denied, and that summary judgment be granted to the Washington Department of Corrections. On June 9, 1997 the District Court issued an order approving the Report

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credit as persons confined in state prisons (up to one-third). CR 39, ER 49-50. Thus, if Mr. Fogle were in Pierce County jail today, his total time spent incarcerated would be less than it was under the local policy in effect when he was there.

and entered judgment for the Department of Corrections. MacFarlane and Fogle appealed.

On May 5, 1999 a panel of the United States Court of Appeals issued a decision which reversed in part and affirmed in part the decision of the District Court. The Court of Appeals held that the county jails' good conduct credit policies violated equal protection, and the jails' good performance credit policies did not violate equal protection. The Department of Corrections' petition for rehearing was denied on June 9, 1999.

REASONS FOR DENYING THE WRIT

1. THERE IS NO CONFLICT BETWEEN *McGINNIS* AND *BEARDEN*. *BEARDEN* STATES THE LAW APPLICABLE TO CASES WHERE INCARCERATION IS AUTOMATICALLY CAUSED SOLELY BY A LACK OF WEALTH. *McGINNIS* DID NOT INVOLVE AUTOMATIC INCARCERATION DUE TO A LACK OF WEALTH,BUT INSTEAD INVOLVED DELAY IN OBTAINING A HEARING THAT *MIGHT* HAVE LED TO RELEASE, PROVIDED THE PRISONER DEMONSTRATED HIS REHABILITATION.

The Washington Department of Corrections contends that this Court's decision in *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L.Ed.2d 221 (1983) did not "clearly establish" any right applicable to the habeas petitioners in this case. While the factual setting of *Bearden* is superficially different from that of the present case, this Court described the principle at stake in *Bearden* as "the ***impermissibility*** of imprisoning a defendant ***solely because of***

his lack of financial resources." 461 U.S. at 661 (italics added). That principle is at stake in the present case as well.

Petitioner Lehman contends that it is *McGinnis v. Royster*, 410 U.S. 263, 93 S. Ct. 1055, 35 L.Ed.2d 282 (1973), rather than *Bearden*, that controls this case. Petitioner suggests that because both *McGinnis* and the present case are prisoner "good time" cases, *McGinnis* controls, and tries to distinguish *Bearden* because it is a case about financial inability to pay a fine. But this type of analysis ignores the material facts which make *McGinnis* inapposite and *Bearden* controlling. *Bearden* and this case both deal with situations where a lack of wealth automatically led to having to spend more days incarcerated. *McGinnis* did not.

A. *Bearden* Controls Because It Articulates the Equal Protection Analysis This Court Has Held Directly Applicable To Cases, Like the Present Case, In Which Lack of Wealth Directly Causes Incarceration.

It does not matter that the respondents' lack of wealth in the present case made them incapable of posting bail, whereas the defendant's lack of wealth in *Bearden* made him unable to pay a fine. These factual differences are immaterial. In both cases, the lack of financial resources led directly to the imposition of additional imprisonment.

Bearden held that incarceration must not be imposed on an indigent individual solely because of that person's inability to pay a fine, following a well established line of

cases prohibiting imprisonment imposed solely on the basis of lack of wealth. *See Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L.Ed.2d 586 (1970) (unconstitutional for state to add time to maximum prison term solely because defendant involuntarily failed to pay fine or costs); *Tate v. Short*, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L.Ed.2d 130 (1971) (jailing a defendant for involuntary failure to pay fines on non-jail offenses unconstitutionally imprisons "solely because of . . . indigency" just as in *Williams*; *Pruett v. Texas*, 414 U.S. 802, 94 S. Ct. 118, 38 L.Ed.2d 39 (1973) (summarily affirming lower court decision that when defendant was in jail pending appeal "because [he] was too poor to make bond," it was unconstitutional to deny good time for this period simply because his sentence did not technically start to run until after his conviction was affirmed (470 F.2d 1182, 1183 (5th Cir. 1973) (en banc)). In all of these cases, the relationship between the inability to pay, and the imposition of additional incarceration time, is direct and automatic.

The decision below cogently explains why *Bearden* is the controlling case notwithstanding any superficial factual distinctions between a criminal defendant's post-conviction inability to pay a fine imposed as part of a sentence, and another defendant's failure to secure pre-trial release from jail due to an inability to post bail.

> Respondents fail to show that there is any meaningful distinction between the case of a poor person unable to pay a fine, who, as a result, suffers longer incarceration than a similarly situated affluent person (*Bearden*) and the case of a poor person unable to post bail pre-trial who, as a result, suffers longer incarceration than a similarly situated affluent person (*MacFarlane* and

> *Fogle*). *Bearden* erected the framework intended for application where a defendant suffers increased incarceration because of indigency and, thus, is clearly established law governing the issue presented here.

MacFarlane v. Walter, 179 F.3d at 1140. This simple logic, deeply grounded in this Court's precedents, demonstrates the correctness of the Court of Appeals' decision in this case.

B. In *McGinnis*, This Court Applied A Standard Equal Protection Analysis That Is Inapplicable To This Case Because the Principle of Incarceration Caused Directly By Lack of Wealth Was Not At Stake.

Petitioner argues that *McGinnis* is the controlling precedent that should be applied to the present case, and that the Washington Supreme Court's decision rejecting MacFarlane and Fogle's claims is not "contrary to" *McGinnis*. *McGinnis*, however, is not applicable to the present case because *McGinnis* does not deal with a situation in which lack of wealth directly caused incarceration.

Petitioner concedes that this Court in *McGinnis* did not frame the issue as one of "disparate treatment of indigent prisoners." *Petition for Writ of Certiorari*, at 16. In order to try to blunt the constitutional significance of this fact, petitioner then goes on to claim that " . . . the Court in *McGinnis* was well aware that the good time differences at issue resulted in longer incarceration for those in pretrial county jail custody because they could not make bail." This attempt to bootstrap *McGinnis* into a case about lack of wealth causing incarceration must fail: This

Court could not have been "aware" that the good time differences at issue in *McGinnis* resulted directly in extra incarceration, because they did not do so.

Under New York's "complex" sentencing system, each state prisoner "received a series of release dates" upon his arrival at prison. *McGinnis*, 410 U.S. at 265-66.

> Each inmate has both a minimum parole date, which is the earliest date on which he may be paroled at the discretion of the Parole Board, and a statutory release date which is the earliest date he must be paroled by the Parole Board. The minimum parole date is calculated . . . by subtracting the greatest amount of good time that can be earned (10 days per month) from the minimum sentence of an indeterminate term. The statutory release date is calculated . . . by subtracting the greatest amount of good time that can be earned (5 days per month) from the maximum sentence of an indeterminate term.

McGinnis, 410 U.S. at 266 (footnotes omitted).

In *McGinnis* this Court reviewed a claim by New York state prisoners regarding the denial of good time credit toward their *discretionary* minimum parole date under a system where parole was conditioned on a showing of rehabilitation. And yet at the same time this Court explicitly noted that under the New York sentencing statutes the prisoners *were* eligible to receive good time credit toward the prisoner's maximum statutory release date:

> While New York does deny good-time credit for jail time in computing the minimum parole

> date . . . , *it allows such credit* in calculating the statutory release date . . . .

McGinnis, 410 U.S. at 267 (italics added).

There was a denial of good time credit for pretrial incarceration time towards the New York prisoners' discretionary minimum parole date. But since parole in New York was dependent upon a showing of rehabilitation, there was no automatic causal relationship between the denial of good time credit towards the minimum discretionary parole date and having to serve a longer term of imprisonment. Therefore, petitioner is in error in suggesting that *McGinnis* is a case involving incarceration caused directly by lack of wealth.

In contrast to the *indeterminate* New York sentencing system with a parole component, where parole of the prisoner was dependent upon a showing of rehabilitation, the respondents here were sentenced under a wholly *determinate* sentencing scheme in which the length of sentences are known from the outset. Since the enactment in 1984 of the Sentencing Reform Act ("SRA"), Washington State has employed this *determinate* sentencing system in which rehabilitation is completely irrelevant and there is no such thing as parole.

"Before the enactment of the SRA, the [Washington] Legislature adhered to a policy that actual time of imprisonment was best determined by the [Parole] Board." *In re Myers*, 105 Wn.2d 257, 262, 714 P.2d 303 (1986). The system was "rehabilitation oriented, with broad discretion given to the Board of Prison terms and Paroles to fix minimum terms according to a wide ranging set of factors." *In re Whitesel*, 111 Wn.2d 621, 626, 763

P.2d 199 (1988) (footnotes omitted). *Accord, State v. Barnes*, 117 Wn.2d 701, 711, 818 P.2d 1088 (1991).

That old sentencing system was akin to the indeterminate component of the New York sentencing system at issue in *McGinnis*. But the Washington Parole Board was phased out and ceased to exist after 1988. *Myers*, 105 Wn.2d at 262. The new determinate sentencing system was created, with a shift "from rehabilitation to proportionality, equality and justice." *Id.* at 710. Since 1984 rehabilitation has been irrelevant to the determination of the length of a prison sentence in Washington State. *Id.* at 711.

Under the determinate sentencing system, a Washington State prisoner has no uncertainty about when he will be released. Under a rehabilitation-centered indeterminate system, such as the New York system at issue in *McGinnis*, a prisoner *might* be paroled at some unknown point in time, *if* the state parole board concludes that the prisoner has made rehabilitative progress. Under Washington State's determinate sentencing system, the length of a prisoner's sentence is fixed from the moment the sentence is judicially imposed, and is completely unaffected by rehabilitative efforts or results.

While the denial of the opportunity to earn an equal amount of good conduct credit leads *automatically* to more incarceration for prisoners like MacFarlane and Fogle who could not afford to post bail in the trial court, the financial inability to post bail of the *McGinnis* prisoners *did not lead automatically* to their having to serve more time in prison.

The statutory release date, towards which New York prisoners did earn good time credit for their presentence jail incarceration time, is analogous to the determinate sentences imposed upon Washington State prisoners such as respondents Fogle and MacFarlane. For New York prisoners who had been unable to secure pretrial release due to an inability to post bail, the relationship between denial of good time credit towards their statutory release date was direct and automatic. Every day of good time credit awarded automatically shortened by one day their statutory release date. Since the New York prisoners *did* receive good time credit for their pretrial detention time towards their maximum statutory release date, there was no incarceration penalty automatically imposed as a result of their financial inability to post bail prior to trial. Thus the issue present in MacFarlane and Fogle's case simply did not arise, and was not addressed by this Court.

In *McGinnis* this Court relied on the fact that the New York indeterminate sentencing system awarded good time primarily for *rehabilitative* efforts, and that while rehabilitative programs existed in the state prisons, they generally did not exist in the local jails:

> We note, further, that the distinction of which appellees complain [between time served in a local jail as a pretrial detainee and time served after conviction and sentence in a state prison] arose in the course of the State's sensitive and difficult effort to encourage for its prisoners constructive future citizenship while avoiding the danger of releasing them prematurely upon society . . . .

> The Commissioner [of the New York Corrections Department] defends this distinction by noting that "state prisons differ from county jails with respect to purpose, usage and availability of facilities." State prisons are "intended to have rehabilitation as a prime purpose and the facilities at these institutions are built and equipped to serve this purpose." The Commissioner cites the presence at state prisons of "educational and vocational services such as schools, facilities, jobtraining programs and related activities." . . .
>
> We pass no judgment on the success or merits of the State's efforts, but note only that at state prisons a serious rehabilitative program exists. County jails, on the other hand, serve primarily as detention centers.

McGinnis, 410 U.S. at 269-271.

This Court held that under a discretionary, indeterminate, rehabilitation-based parole system, "[t]hese significant differences" between prisons and county jails "afford[ed] the basis for a different treatment within a constitutional framework." *Id.* at 271.

> As the statute and regulations contemplate state evaluation of an inmate's progress toward rehabilitation, in awarding good time, it is reasonable not to award such time for pretrial detention in a county jail where no systematic rehabilitative programs exist and where the prisoner's conduct and performance are not even observed and evaluated by the responsible state prison officials. Further, it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.

McGinnis, 410 U.S. at 272-73.

But these distinctions do not exist in Washington State. Under the determinate sentencing system adopted in 1984 by the enactment of the SRA, both jails and prisons "serve primarily as detention centers," and rehabilitation effort and progress is irrelevant to the length of a prison sentence.

Since parole was conditioned upon a showing of rehabilitation in New York, a delay in providing a parole hearing at the minimum parole date would not lead automatically to a longer sentence. For even if good time credit for time served in local jails was credited towards the minimum parole date, since parole was *discretionary*, there was no guarantee that parole would actually be granted on the minimum parole date. And since parole was conditioned upon a showing of rehabilitation that could not be made until the prisoners arrived in state prisons where rehabilitative programs were offered, it was unlikely that parole would be granted until after the prisoner had spent a significant amount of time in a state prison facility.

The rationale of *McGinnis* is completely inapplicable in a state such as Washington where there is a determinate sentencing system, there is no parole, and rehabilitation is completely irrelevant to the question of when a prisoner will be released from prison. In fact, in an earlier decision the Washington Supreme Court **specifically rejected** the relevance of *McGinnis* to good time calculation under Washington's Sentencing Reform Act because when considering prison sentences imposed under the SRA "[r]ehabilitation is irrelevant;" since it "does not rise to the level of a substantial interest under the SRA it cannot justify disparate treatment of offenders." *In re*

Mota, 114 Wn.2d 465, 476, 788 P.2d 538 (1990). Thus the state supreme court held in *Mota* that Washington prisoners must be eligible to earn good time credit for their good conduct during the period of their pretrial detention in a county jail.

In sum, *McGinnis* may be the correct law to apply to an equal protection challenge brought in an indeterminate sentencing State where release from confinement does not automatically occur on the minimum parole eligibility date, and instead depends upon a discretionary official determination that a sufficient showing of rehabilitation has been made. But *McGinnis* is not the correct law to apply in a determinate sentencing State like Washington where release is automatic once a prisoner has served his determinate sentence. *McGinnis* does not control an equal protection claim that the length of imprisonment has been increased ***solely*** because a pretrial detainee's lack of wealth made it impossible for him to bail out of a county jail which did not permit pretrial detainees to earn as much good time as might be earned by a wealthier defendant who posted bail, was at liberty during his pretrial stage, and who later served his entire sentence in a state prison facility.

In *MLB v. SLJ*, 519 U.S. 102, 117 S. Ct. 555, 136 L.Ed.2d 473 (1996), this Court recently reaffirmed the vitality of the holding of *Bearden* and it antecedents. The issue arose in the context of a civil case where the parental rights of a mother had been terminated by the trial court. The question presented was whether the Fourteenth Amendment required the State to accord the parent access to an appeal which would have been available "but for her inability to advance required costs." *MLB*,

117 S. Ct. at 565. Relying upon *Bearden* this Court held it unconstitutional to permit an indigent parent's inability to advance required appeal costs to have the automatic effect of denying her the same type of appellate review that a more affluent parent could obtain.

> As we said in *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 2068-2069, 76 L.Ed.2d 221 (1983), in the Court's *Griffin*-line cases, "due process and equal protection principles converge." The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. [Citation omitted]. The due process concern homes in on the essential unfairness of the state ordered proceedings anterior to adverse state action. [Citation omitted]. A "precise rationale" has not been composed [citation], because cases of this order "cannot be resolved by resort to easy slogans or pigeonhole analysis," *Bearden*, 461 U.S. at 666, 103 S. Ct., at 2069.

MLB, 117 S. Ct. at 565.

Petitioner's focus on the application in *McGinnis* of the rational basis standard is precisely the type of "pigeonhole analysis," that *Bearden* and *MLB* rejected. Petitioner would have this Court view this case simply as a bail/good time case. Such an approach is inconsistent with *MLB*, where this Court recognized that even though *Bearden* involved jail time imposed for inability to pay a fine, its equal protection principle was applicable to a situation where access to an appeal of a parental rights termination order was blocked solely because the parent couldn't pay appeal costs.

Petitioner's unconvincing attempt to place this case and *McGinnis* into the same pigeonhole is highlighted by petitioner's own concession that this Court's *McGinnis* opinion did not frame the issue as one of disparate treatment of indigent prisoners. *Petition for Writ of Certiorari*, at 16. Thus petitioner effectively concedes that the Court of Appeals was correct when it concluded that *McGinnis* was not controlling:

> *McGinnis*, however, decided 12 years before *Bearden*, was not about indigency: although appellees Royster and Rutherford appear to have been unable to post bail because of indigency, 410 U.S. at 266-67, the issue was not framed as one of disparate treatment of indigent prisoners, nor did the Supreme Court so analyze it. . . . The petitioners here, as the Washington Supreme Court recognized, explicitly claim an equal protection violation based on their indigency. This is not to say that the Supreme Court in *McGinnis* could not have treated the case as one about indigency and analyzed the issue in this light, but it did not do so and, therefore, is not on point. It is probably for that reason that the Supreme Court did not mention *McGinnis* when it decided *Bearden*.

MacFarlane v. Walter, 179 F.3d at 1140, n.11.

This is not to say that *McGinnis* is not relevant to some cases involving equal protection challenges to disparate good time credit treatment of subclasses of prisoners. For example, an equal protection challenge to a policy of giving more good time credit to prisoners convicted of property offenses, than to those convicted of violent crimes against persons, would be governed by the

McGinnis rational basis standard. On the other hand, an equal protection challenge to a policy of allowing prisoners of one race to earn good time credit, while denying good time credit to prisoners of a different race, would trigger strict scrutiny, and clearly would not be governed by *McGinnis*.

In sum, there is no conflict between *Bearden* and *McGinnis*, nor is there any conflict between the decision below and *McGinnis*. Thus there is no reason to exercise the extraordinary power of certiorari to review the decision below.

2. THIS CASE IS NOT LIKELY TO BE AFFECTED BY THIS COURT'S DECISION IN *WILLIAMS v. TAYLOR*

Petitioner claims that "[t]his case will be directly affected by any decision this Court renders in *Williams v. Taylor," cert. granted,* 119 S. Ct. 1753 (1999). *Petition for Writ of Certiorari,* at 10. Respondents respectfully submit that this is not so. While this Court's decision in *Williams* certainly will resolve some issues regarding the proper construction of statutory language contained in 28 U.S.C. Section 2254(d), the *Williams* decision is unlikely to either control or provide any significant guidance as to how this case should be decided.

28 U.S.C. Section 2254(d)(1) provides that a writ of habeas corpus shall not be granted to a person in custody pursuant to a state court judgment unless the federal habeas court finds that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States." The first question presented in *Williams* involves the degree of similarity that must exist between a Supreme Court precedent and a habeas petitioner's case, such that the precedent may be viewed as a "clearly established" and "contrary" Supreme Court precedent. That question reads:

> Did the Fourth Circuit err in concluding that, under 28 U.S.C. Section 2254(d)(1), state habeas court's decision to deny federal constitutional claim cannot be "contrary to" clearly established federal law unless it is in "square conflict" with decision of this court that is "controlling as to law and fact"?

65 Crim. L. Rep. 2001 (April 7, 1999).

The Fourth Circuit has ruled that a decision is "contrary to" Supreme Court precedent only when "either through a decision of pure law or application of facts indistinguishable *in any material way* from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent which addresses the identical issue." *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) (italics added). The panel in *Williams* specifically relied upon the *Green* construction of Section 2254(d)(1) when it denied relief to the habeas petitioner. *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998).

The *Williams* petitioner presented a Sixth Amendment ineffective assistance of counsel claim, and argued that the state court's rejection of his claim was contrary to this Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Of course the

facts of *Strickland* were not *absolutely* identical to the facts of petitioner Williams' case. Finding an insufficient degree of factual identity between the facts of *Williams* and *Strickland*, the Fourth Circuit cursorily decided that Williams was not entitled to any relief under the "contrary to . . . clearly established Federal law" portion of Section 2254(d)(1).[2]

Even if this Court were to adopt the Fourth Circuit's view that a Supreme Court precedent must involve facts which are not materially different from those presented by a state prisoner seeking federal habeas corpus relief,

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[2] If absolute factual identity were required before any state prisoner seeking habeas relief could prevail in a federal court, then virtually no case would ever be able to qualify for a grant of habeas relief under the "contrary to" portion of Section 2254(d). Respondents MacFarlane and Fogle respectfully submit that the Ninth Circuit was correct when it rejected such a "absolute factual identity" construction of the "contrary to" portion of Section 2254(d)(1): "If that were the standard, however, hardly any law would be 'clearly established,' for only cases presenting precisely the same facts could govern later cases." *MacFarlane v. Walter*, 179 F.3d 1131, 1138 (9th Cir. 1999). Moreover, this Court has held in other contexts that a precedent is "clearly established" if it compels a particular result, even though the facts of the precedent may not be identical to the facts of the case before the court. *See Wright v. West*, 505 U.S. 277, 304, 112 S. Ct. 2482, 120 L.Ed.2d 225 (1992) (O'Connor, J., concurring) (applying existing precedent to a different set of facts in a habeas case is not a "new rule" if the factual differences do not change the force with which the precedent's underlying principle applies); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987) (rejecting notion that a right can be clearly established for qualified immunity purposes only if "the very action in question has previously been held unlawful.")

that would not change the result in this case because the *material* facts in this case are not different from the *material* facts in *Bearden*.

The materials facts of this case are those identified by the Court of Appeals below: a poor person, solely by reason of his indigency, faces more incarceration than a similarly situated affluent person. This was true of respondents MacFarlane and Fogle. This was also true of petitioner Bearden. Since the *material* facts of this case and the *Bearden* case are identical, the result in this case will *not* change even if this Court affirms the Fourth Circuit in *Williams* and adopts the Fourth Circuit's test for determining when a state court decision is "contrary to" a "clearly established" precedent of this Court. If this Court rejects the Fourth Circuit's test in favor of some less stringent test for determining when a state court decision is "contrary to" a clearly established precedent of this Court, that also would have no effect on the decision in this case.

The remaining "questions presented" in *Williams* concern a claim of ineffective assistance of counsel, and the proper interpretation of the phrase "unreasonable application of" clearly established federal law.[3] The present

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[3] The third question presented in *Williams* reads:

> Did the Fourth Circuit err in concluding that, under 28 U.S.C. Section 2254(d)(1), state habeas court's decision to deny federal constitutional claim cannot involve "unreasonable application of" clearly established federal law unless state court's decision is predicated on interpretation or application of

case does not involve any claim of ineffective assistance of counsel. Nor does it involve any construction of the "unreasonable application" portion of Section 2254(d)(1). In the present case the Court of Appeals expressly declined to address the issue of whether the state court's denial of relief was "an unreasonable application of" Supreme Court precedent, because it was wholly unnecessary to address that question. Although recognizing that there might be some overlap between the "contrary to" and the "unreasonable application of" provisions, the Court of Appeals found it unnecessary to decide whether the Washington State Supreme Court's decision fell into Section 2254(d)(1)'s second category of cases where relief may be granted, as well as the first.

> The Washington Supreme Court's failure to apply *Bearden*, and its resultant decision that the county jails' good-conduct policies did not violate equal protection, was "contrary to . . . clearly established . . . Federal law" within the meaning of 28 U.S.C. § 2254(d). Such a failure to identify or apply the governing Supreme Court standard unquestionably falls within the "contrary to" provision of AEDPA. [Citation omitted]. . . . We . . . have not sought to draw a rigid distinction between the "contrary to" and "unreasonable application of" provisions, both of which reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme

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relevant precedent that "reasonable jurists would *all* agree is unreasonable"?

65 Crim. L. Rep. 2001 (April 7, 1999).

> Court. Indeed, we have stated that there is an overlap in the scope of the two provisions. [Citation]. Again, however, ***because the "contrary to" provision is clearly met, we need not consider whether such an overlap exists.***

MacFarlane v. Walter, 179 F.3d at 1142 (italics added).

In sum, it is unlikely that this Court's decision in *Williams* would have any impact on this case. Of course it is always possible that this Court could decide, or comment upon, related questions pertaining to the proper construction of Section 2254(d)(1) which are not set forth in the *Williams* certiorari petition. But only in the event that this Court radically narrowed the availability of federal habeas relief to state prisoners, in a way that has not been suggested by any lower federal court, would *Williams* be likely to affect the outcome of this case. In that unlikely event, this Court might consider the option of granting certiorari, vacating the judgment below, and remanding for reconsideration in light of its *Williams* decision. But there would be no need for this Court to grant certiorari in order to retain this case, so that this Court could repeat whatever holding it decides to render in the *Williams* case.

CONCLUSION

The *Bearden* principle that incarceration cannot be imposed solely because the prisoner does not have the money necessary to secure his freedom is fully applicable to this case. The holding of *McGinnis*, is that it is rational to delay the holding of a parole hearing which might

result in release from confinement provided the prisoner makes a showing of rehabilitation, until the prisoner has had the opportunity to participate in rehabilitative programs. That holding has no application at all to the present case. Since *Bearden*, and not *McGinnis*, is the controlling "clearly established Federal Law" set down by this Court, there was no error committed by the court below, and there is no conflict between *Bearden* and *McGinnis* that warrants resolution by this Court.

This Court has many times declared that its certiorari jurisdiction is to be exercised sparingly, and only in cases of peculiar gravity and general importance. *Hamilton Brown Shoe Company v. Wolf Brothers & Company*, 240 U.S. 251, 36 S. Ct. 269, 60 L.Ed. 629 (1916). Given that only one of the two county jails in these consolidated cases is still adhering to a differential good time credit policy that denies inmates the opportunity to earn the same amount of good time credit as that which exists in the state prisons, this case hardly seems like one which involves a legal dispute of national importance.

Accordingly, respondents suggest that the Court should deny the petition for certiorari in this case.

Respectfully submitted,

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NO. 99-437

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH LEHMAN, SECRETARY, WASHINGTON STATE DEPARTMENT OF CORRECTIONS

Petitioner,

v.

DONALD MACFARLANE and JAMES FOGLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NITH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Petitioner submits this supplemental brief in accordance with the Court's request for advice concerning Respondents' current custody status and whether this case is now moot or may become moot in the future.

RESPONDENTS' CUSTODY STATUS

A. Respondent MacFarlane

On June 24, 1991, in Clark County, Washington, Respondent Donald D. MacFarlane was sentenced for a conviction of one count of Violation of the Uniform Controlled Substance Act (VUCSA) and one count of Third Degree Assault. Pursuant to a plea agreement, Mr. MacFarlane received an exceptional sentence of 72 months' confinement on the VUCSA conviction and eight months' confinement on the assault conviction, the terms to run concurrently. In addition to the prison sentence, Mr. MacFarlane was sentenced to a one-year term of community placement.[1]

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[1] "Community placement" under Washington law is "that period during which the offender is subject to the conditions of community custody and/or post-release supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned early release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two." Wash. Rev. Code § 9.94A.030(5).

"Community custody" is defined as "that portion of an inmate's sentence of confinement in lieu of earned early release time or imposed pursuant to RCW 9.94A.120(6)(8) or (10) served in the community subject to controls placed on the inmate's movement and activities by the department of corrections." Wash. Rev. Code § 9.94A.030(4).

Mr. MacFarlane completed his prison term on March 10, 1995, for the Clark County conviction and, pursuant to the award of good time, was transferred to a consecutive Pierce County conviction for one count of Violation of the Uniform Controlled Substances Act (VUCSA) and one count of bail jumping.[2] He was sentenced to 50 months' confinement on the VUCSA count and 24 months and one day confinement on the bail jumping count. In addition, Mr. MacFarlane was sentenced to a one-year term of community placement.[3]

Mr. MacFarlane completed his prison terms and was released to the State of Oregon on an interstate transfer for his community placement sentence on January 22, 1998. No later than February 1, 1999, his sentence expired and he is no longer in the custody of the Washington Department of Corrections.

B. Respondent Fogle

On March 26, 1992, in Pierce County, Washington, Respondent James Fogle pleaded guilty to one count of VUCSA. Pursuant to a plea agreement, he was sentenced to 60 months' confinement. Because Mr. Fogle committed his 1992 drug crime while on parole from an indeterminate sentence for an earlier, unrelated robbery conviction, the 1992 Pierce County sentence ran concurrently with a 36-month new minimum parole term imposed by the Indeterminate Sentence Review Board. In addition to the confinement term, Mr. Fogle was sentenced to a one-year term of community placement.

On May 26, 1995, Mr. Fogle, pursuant to the award of good time credits, became eligible for transfer to community

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[2] "Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason." Wash. Rev. Code § 9.94A.170(3).

[3] The community placement terms on both the Clark County conviction and the Pierce County conviction were served concurrently.

placement and on June 1, 1995, was released on parole and to begin serving his community placement term. Mr. Fogle completed approximately two months of his community placement term when he was arrested and convicted for one count of Burglary in the Second Degree in Lewis County, Washington. He received a sentence of 68 months' confinement for the new Lewis County offense and was re-admitted to the Washington Department of Corrections on September 1, 1995. As a result, the remainder of his community placement term for his Pierce County conviction tolled while he was in confinement on the unrelated 1995 conviction.[4]

On or about June 10, 1999, Mr. Fogle was released to his community placement term for the Pierce County conviction. Mr. Fogle's community placement term for his 1992 Pierce County conviction will expire on May 1, 2000.

STATEMENT OF MOOTNESS

Under Article III, § 2 of the Constitution, federal courts have no authority to decide the merits of a moot question. Throughout all stages of federal litigation, trial and appellate, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). In federal habeas corpus cases under 28 U.S.C. § 2254, the petitioner's constitutional challenge to his *conviction* is not rendered moot simply by his release from custody. *Sibron v. New York*, 392 U.S. 40, 51 (1968). This is because a criminal conviction has many collateral legal consequences that may persist despite the petitioner's release from custody. *Id.* at 55-57; *see also Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985); *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968).

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[4] If Mr. Fogle had not committed his Lewis County offense in 1995, his community placement term for the 1992 Pierce County conviction would have been completed in 1996.

If, however, the petitioner challenges only the *sentence* imposed, rather than the underlying conviction, the expiration of the petitioner's sentence during the course of the litigation will render his case moot. "Nullification of a conviction may have important benefits for a defendant . . . but urging in a habeas corpus proceeding the correction of a sentence already served is another matter." *North Carolina v. Rice*, 404 U.S. 244, 248 (1971). In such examples, the petitioner has obtained all the relief that he sought (*i.e.*, release from custody), and no live case or controversy remains. *Lane v. Williams*, 455 U.S. 624, 633 (1982).

Respondent MacFarlane's habeas corpus challenge to the length of his sentence is clearly moot. He has never challenged his underlying 1992 Clark County conviction but rather the amount of good time credits he received for his pretrial detention for that offense. He completed serving his sentence in February of 1999. Respondent MacFarlane has obtained, through the mere passage of time, all the relief that he originally sought in his petition. *Lane*, *supra*. His habeas petition is therefore moot.

Respondent Fogle's status is somewhat different from Mr. MacFarlane's because his sentence is not due to expire until May 1, 2000, after which date his case will be moot. His habeas petition, like Mr. MacFarlane's, constituted a challenge to the award of good time credits for pretrial detention and did not attack the underlying 1992 Pierce County conviction. But for his 1995 Lewis County conviction, his community placement term for the 1992 conviction would have continued uninterrupted and his sentence would have expired in 1996. It is at least conceivable that, if the Ninth Circuit's decision stands and the district court issues the writ on remand, Mr. Fogle may receive some benefit from the Ninth Circuit's decision (*i.e.*, a release from community placement on a date earlier than May 1, 2000).

Respondents' habeas petitions are either presently moot (Respondent MacFarlane) or will become moot in the very near

future (Respondent Fogle). The proper action for this Court to take (at least, with respect to Respondent MacFarlane's habeas corpus petition) would be to vacate the judgment of the Court of Appeals for the Ninth Circuit with directions that it instruct the district court to dismiss as moot the habeas corpus petition, or both petitions, if appropriate. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 22-23 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *See also McCarthy v. Blair*, 498 U.S. 954 (1990) (applying *Munsingwear* rule to habeas corpus case). The remedy of vacatur "clears the path for future litigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Munsingwear*, 340 U.S. at 40. In the present case, vacating the Ninth Circuit's decision would clear the path to future litigation, in the context of an actual case or controversy, of the legal claim presented by Respondents' habeas petitions and the proper application of 28 U.S.C. § 2254(d).

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CONCLUSION

Petitioner respectfully requests that this Court vacate the decision of the Ninth Circuit and order the dismissal of Respondent MacFarlane's habeas corpus case as moot. The petition for a writ of certiorari should be granted with respect to Respondent Fogle. In the event this Court does not take action on Petitioner's petition before May 1, 2000, however, Respondent Fogle's case should also be dismissed as moot.

RESPECTFULLY SUBMITTED

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